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In the
Supreme Court Of The United States

MARCELL MILLS JR., JAMES W. OLIVER, JR., CARL LEE JR., PAUL E. WILLIAMS,, AND MAURICE BELCHER BEY,

PETITIONERS

vs.

GRAY DAVIS, STATE OF CALIFORNIA GOVERNOR; GERALD GOLDBERG, FRANCHISE TAX BOARD EXECUTIVE OFFICER; BRAD SHERMAN, BOARD OF EQUALIZATION CHAIRMAN; RUSSELL S. GOULD, DIRECTOR OF FINANCE; KATHLEEN O'CONNELL, STATE CONTROLLER; ALLEN HUNTER ASSISTANT EXECUTIVE

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

With Appendix

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THE QUESTIONS PRESENTED FOR REVIEW

In light of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) and *Clark County v. Breeden*, 532 U.S. 268 (2001), in a Title VII case, that an altering of the terms and conditions of employment can be sufficient evidence of disparate impact, does the fact that the California Constitution calls for competitive competition for employment hiring and promotion, and the legislature and State Personnel Board manage employment practices in such a manner as to hide objective test scores that permits subjective interview scores to be determinative, then produce ranks with hundreds in each rank, such that in practice the hiring supervisor can hire a particular individual of choice regardless of merit, and minorities have been adversely affected by the system, is there sufficient evidence of "altered terms and conditions of employment" evidence of disparate impact to take to a jury?

In light of *Degen v. United States*, 517 U.S. 820 (1996) does a district court in a Title VII case abuse its discretion in the exercise of its gatekeeper function when it weighs what appears to be credible evidence and ignores other evidence tending to show a practice and pattern of discrimination?

In light of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-660 (1989), does a district court in a Title VII case abuse its discretion by requiring a showing of statistical evidence in the face of 13 declarations by management noting the manner in which candidates were hired or promoted, and 6 more produced on motion for reconsideration?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is set forth in the Appendix, at App., p. B1. The decision of that court denying petition for rehearing and suggestion for rehearing en banc is set forth in the appendix at page A1.

The unpublished opinion of the District Court granting Respondents' motions for summary judgment is set forth in the appendix at G1 and H1. The unpublished opinion of the district court denying Petitioners' motion for reconsideration is set forth in the appendix at page F1.

JURISDICTIONAL STATEMENT

1. The decision of the Ninth Circuit denying the petition for rehearing was filed on January 29, 2003. App., p. A1.

2. Petitioner believes that 28 U.S.C., § 1257 and Supreme Court Rule 13.1 confer *jurisdiction* on this court because the petition seeks review of an action within 90 days of the entry of an order denying a petition for rehearing.

STATUTORY PROVISIONS INVOLVED

42 U.S.C., § 2000e, et seq. Employment Discrimination.

California Constitution, Art. 7 Public Officer and Employees. Section 1(b) requires permanent appointment and promotion to be made under a general system based on merit ascertained by competitive examination

Govt. C., § 19057.1, requires, for positions in classes designated as professional, scientific, or administrative, that for purposes of ranking, scores of eligibles on employment lists for these classes shall be

rounded to the nearest whole percent. A rank shall consist of one or more eligibles with the same whole percentage score.

Govt. C., § 19057.2, requires, for positions in classes designated as management, there shall be six ranks wherein the first rank shall consist of those eligibles with a score of 95 percent or higher, the second, 90 to 94 percent, the third 85 to 89 percent, the fourth rank 80 to 84 percent, the fifth rank, 75 to 79 percent, and the sixth rank 70 to 74 percent.

STATEMENT OF THE CASE

A.. PROCEDURAL HISTORY

The district court granted summary judgment against Petitioners Mills, Oliver, Lee, and Belcher-Bey on July 25, 1999, and against Petitioner Williams on November 17, 1999. The district court also granted defendant Aleece Marendt's motion for summary judgment on Mills' 42 U.S.C., § 1983 claims. On May 23, 2001, plaintiffs moved for reconsideration premised on their discovery of "new evidence." The "new evidence" consisted of the December 29, 2000 report of the Joint Labor/Management Committee on Discrimination (the "JL/MCD report"), augmented by evidence the court appeared to have mishandled, i.e., the declaration of witnesses Young and Sims, and a series of depositions taken after the motion for summary judgment. The district court denied the motion and entered final judgment,

Petitioners appealed the district court's grant of summary judgment in their Title VII action alleging that the California Franchise Tax Board ("FTB") and various employees thereof discriminated against them based on their race (African-American) and gender (male). *See* 42 U.S.C., § 2000e et seq. They also appealed the district court's denial of their motion for reconsideration. In addition, Mills appealed the district

court's grant of defendant Aleece Marendt's motion for summary judgment on Mills' 42 U.S.C., § 1983 claims.

On December 20, 2002, the district court filed its memorandum in favor of the respondents and against the petitioners, affirming the judgment of the United States District Court.

B. SUMMARY OF FACTS

1. Introduction

Defendants brought on a motion for summary judgment against Marcell Mills, Jr. (hereinafter, Mills), James Oliver (hereinafter, Oliver), Maurice Belcher-Bey (hereinafter, Belcher-Bey, Carl Lee (hereinafter, Lee), Van Evans, and Anthony Brewer.[1] The court issued its opinion on July 25, 1999. The court granted defendants' motions for summary judgment as to the moving parties. It granted defendants' motion against Evan's and Brewer's 1983 claim against Goldberg. All other motions were denied. Opinion, p. 35, Excerpt, p. 2582.

On 5/23/01, Appellants sought reconsideration of the adverse adjudication based on the Joint Labor/Management Committee on Discrimination Report to the State Personnel Board (SPB) On Discrimination in State Civil Service December 2000 (hereinafter JL/MCD Report) and additional depositions. That motion was denied on 7/9/01 (Excerpt, p. 2595), and on 9/6/01, on motion of defendants, a judgment was entered. Excerpt, p. 2609.

2. Marcel Mills

a) Allegations

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[1] Michael Melvin settled his case with FTB prior to the motions for summary judgment. Anthony Brewer settled after these motions. The Referee in Bankruptcy caused the dismissal of Van Evans case. The sole plaintiffs left are the petitioners.

Mills claims that (a) the FTB discriminated against him on the basis of his race and gender by failing to promote him and by terminating his employment; (b) the FTB maintained a hostile environment, failed to promote him, and terminated his employment in retaliation for filing his Title VII lawsuit; (c) defendant Marendt caused his arrest and search without probable or reasonable cause in violation of his Fourth Amendment Rights; (d) defendants Goldberg, Porto, and Marendt terminated his government employment without due process of law; and (e) defendants Goldberg, Porto, and Marendt deprived him of his rights to speech and privacy protected by the First and Fourth Amendments. Opinion, p. 6, Excerpt, p. 2553.

b) Factual Background

Mills, an African-American male, began working for the FTB in 1987. Starting in 1989, he was promoted to the position of Office Services Supervisor I ("OSS I"). In June 1991, Mills took medical leave due to workplace stress, possibly caused or worsened by his belief that the FTB discriminated against black men in hiring and promotions. He returned to his position as an OSS I in the Bank and Corporation ("B & C") Section in September 1993. In March 1995, he was promoted to the level of OSS II on a limited-term basis so that he could supervise a group of part time student clerks. During this time, his first-line supervisor was Diane Nix. Aleece Marendt, Nix' supervisor, was Mills' second-line supervisor. The limited-term OSS II position ended on June 30, 1995, and Mills returned to his previous position as an OSS I. Opinion, pp. 6, 7; Excerpt, pp. 2553, 2554.

At the time that the OSS II position was coming to an end, there was some dispute about whether Mills would return as an OSS I, or whether he would be moved to a non-supervisory position as part of a departmental plan to cut down on "middle- management." Ultimately, it was determined that Mills had to

be returned to his former supervisory position, because he did not volunteer for the lower rank. Opinion, p. 7, Excerpt, pp. 2554.

On July 13, 1995, Nix and Mills got into a confrontation. Nix was speaking angrily to Mills, standing so close to him that he commented that she was spitting on him. Nix started to walk past Mills. On her way by him, she struck him with her forearm, elbow and shoulder Mills fell into a desk and credenza and dropped his briefcase. Both Mills and Nix filed complaints against each other. Ibid.

Marendt conducted an investigation of the incident. She interviewed each of the witnesses whom Mills and Nix had identified, then interviewed Nix, but not Mills. As part of Marendt's investigation of the incident, several of the managers she supervised expressed they felt threatened by Mills. For example, one supervisor felt the need to be escorted by a co-worker to the parking lot at night, because she feared a confrontation with Mills. Another supervisor reported a conversation with Mills in which Mills said he needed prescription drugs to control his anxiety. The conversation then turned to discuss a recent event in which an employee had shot his managers.[2] Marendt's investi-

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[2] Although Mills' deposition testimony regarding this conversation demonstrates that his comments are capable of a nonviolent interpretation, what is relevant is what was reported to Marendt in her investigation. See Vargas v. Gromko, 977 F. Supp. 996, 1002-1003 (N.D. Cal. 1997). Jim Patterson reported to Marendt that:

> [h]e than [sic] went into telling me how he was on the edge and was taking anxiety medication and that he did not know what would happen if he did not take this medication. The than [sic] made reference to the guy in L.A. that killed his three administrators. He said even though he felt he could lose it at anytime that he didn't have it in him to do that. I said you are not telling me that you are going to come in here and do that and he replied that if he did I

gation also uncovered that Mills had made some statements to co-workers that could be construed as hostile to women in the workplace. Opinion, p. 7, 8, Excerpt, pp. 2554, 55.

As the result of her investigation, Marendt determined that she should terminate Mills. Mills was placed on administrative leave on August 1, 1995, and served with a Notice of Adverse Action to terminate his employment in September. Prior to the effective termination date, Mills had a Skelly (due process) hearing and the Skelly officer upheld the dismissal. Mills appealed the dismissal to the State Personnel Board, but voluntarily withdrew his appeal after 6 days of evidentiary hearings. Opinion, 8, Excerpt, pp. 2555.

3. James Oliver

a) Claims

Oliver claims that (a) the FTB discriminated against him on the basis of his race and gender by failing to promote him; and (b) the FTB maintained a hostile environment and failed to promote him in retaliation for filing his Title VII lawsuit denying him positions or promotions in four different departments: (1) the School Partnership Program; (2) the Tax Compliance Representative position in the FEU; (3) the SSA positions in the B & C Section; and (4) positions on the Women's Advisory Committee and later the Employees' Advisory Committee (EAC). Oliver also claims the FTB retaliated for his participation in the Title VII law-

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> would not know it until I heard the bullets flying. He than [sic] said I reiterate that I am not the type of person that would do that because I would not be able to live with myself if I did but that he is that close to going over the edge an [sic] was just using that as an example.

(Mills Decl., Exh. AM6, Excerpt, p. 1406.) Appellants, in light of Young's declaration believe that this merely raises a triable issue of material fact as to whether the claims of fear are bona fide or pretext. See, II.B, infra at p. 31.

suit and complaints of discrimination by creating a hostile working environment. Opinion, p. 12, Excerpt, p. 2559.

b) Background

Oliver, an African-American male, has worked for the FTB since 1987. He has held the positions of Tax Program Assistant and Program Technician III ("PT III"). He currently holds the position of Customer Service Specialist. Ibid.

In October 1994, Oliver was interested in the position of Coordinator of the FTB's School Partnership Program. He had interviewed for the position in 1993 and, although he was not selected for the job, Pam Langbehn told him it had been a tough choice and she encouraged him to reapply the next time the position was open. When the position became open again in the fall of 1994, Oliver was not interviewed or selected for the position. A Hispanic male filled the position. Oliver applied for the position again in June 1997, and again was not interviewed or selected. Ibid.

In August 1994, Oliver took a voluntary demotion from PT III to Tax Technician so that he could work in the Filing Enforcement Unit ("FEU"). He took the examination for the position of Tax Compliance Representative, so that he could apply for any promotional positions that opened up. Cathy Cleek was the manager of the FEU. Oliver expressed interest to her in being promoted to the Tax Compliance Representative position in the FEU. In February 1995, two positions for Tax Compliance Representative in the FEU were announced as open for lateral transfers, i.e., open for those who were already Tax Compliance Representatives. After Oliver submitted his application, the supervisor declined to interview applicants and selected Mark Roth, a white male, for the position. The other position did not become available, because the employee who formerly held the position decided not to leave. Id, pp. 12, 13, Excerpt, p. 2559-60.

In 1994, Oliver and three other black men met with the Employee Assistance Program ("EAP") Coordinator to discuss the creation of a black EAP. At the time, there was at the FTB a Women's Advisory Committee and various associations related to group membership (e.g., Hispanic, Filipino, Asian-Pacific heritage, disabled, and gay). Oliver claims that the FTB opposed formation of a black employees' advisory committee on the grounds that it would be too divisive. Instead, Oliver took steps to reorganize the various employee groups into a general EAP. Ibid.

In January 1995, two positions at the PT III level were advertised as available in the B & C Section. Oliver did not apply for them, and the positions were filled with two white women. Within a few weeks, it was determined that the duties for these positions were more accurately reflected by the rank of Staff Service Analyst ("SSA"). The positions were reclassified as SSA positions. Id, p. 13, Excerpt, p. 2560.

In February 1995, Oliver spoke with Jackie Griffin, the Equal Opportunity Officer, and mentioned that he was thinking of applying for the Women's Advisory Committee. At this time, Griffin had knowledge of the filing of the Title VII lawsuit. Oliver claims that Griffin discouraged him from applying, saying he would only start trouble. Id, p. 13, 14, Excerpt, p. 2560-61.

Oliver's efforts to create a unified EAC came to fruition in June 1995. Oliver received a certificate of recognition for his efforts in bringing about the change. Early in 1997, Oliver applied for a position on the Employees' Advisory Committee, but was not selected for the position. Oliver does not provide any information about the requirements for the position or the qualifications of those who received the position. Id, p. 14, Excerpt, p. 2561.

4. Carl Lee

a) Claims

Lee claims the FTB discriminated against him on the basis of his race, gender, and the fact that he married a white woman by maintaining a hostile environment and by failing to promote him. Opinion, p. 21, Excerpt, p. 2568.

b) Factual Background

Lee is an African-American male. In January 1990, he was promoted to the position of Tax Auditor and was on probationary status for one year. The first 12 weeks consisted of a training class.[3] The Training Coordinator observed that he completed less than half of the reading assignments and was disruptive to the class by leaving early. In his first probation report, his performance was rated "does not meet job expectations" in one area. In his second, third, and fourth probation reports, his performance was rated "does not meet job expectations" in four areas. Lee was then demoted to his previous position as Tax Technician. Id, p. 22, Excerpt, p. 2569.

Lee had no further performance problems until July 1993, when he suffered a back injury at work. After the injury, the State Compensation Insurance Fund investigated the claim. The investigator contacted Lee's supervisor at the time, Denise Springer, who gave him the names of the employees who may have witnessed the injury. Id, p. 23, Excerpt, p. 2570.

After his injury, Lee was absent from work frequently: 35 hours in July, 1993, 43 hours in August, 55 hours in September, 56 hours in October, 73 hours in November, 66 hours in December, 47 hours in January, 1994, 53 hours in February, 52 hours in March 47 hours in April, 75 hours in May, and 110 hours in June. When Ruth Moore became Lee's supervisor in July 1994, she reviewed the inventory of cases assigned to Lee and found that he had fallen

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[3] During this time, he announced to his co-workers his marriage to a white woman

behind in his performance. Lee disputes this, but has no evidence to show that his performance was satisfactory. On January 6, 1995, Moore wrote a negative review of Lee's workload problems and gave him two negative performance evaluations in March and October of 1995. His improved performance was reflected in his March 1996 performance valuation. Id, p. 22-23, Excerpt, p. 2570-71.

Moore was also concerned about how often Lee took leave. Beginning in mid-1994, she required that Lee bring authorization from his doctor when the leave was related to his back injury. She also required that he provide 24-hour notice of use of vacation leave, because he was using it so frequently. Ibid.

Lee's claim that Moore required him to tell her the substance of his meetings with his "legal counsel" before he could be allowed to take leave is actually about his meetings with the union representative.[4] After a discussion with Moore's supervisors, it was decided that Moore would no longer ask staff the subject of the meetings with the union representative. Id, p. 23, Excerpt, p. 2570.

In 1996, Lee applied for a promotional position as Staff Information Systems Analyst (Specialist). Id, p. 23, Excerpt, p. 2570.

5. Maurice Belcher-Bey

a) Claims

Belcher-Bey claims that the FTB discriminated against him on the basis of his race and gender by failing to hire him. Opinion, p. 26, Excerpt, p. 2573.

Belcher-Bey can establish the elements of the prima facie case as set forth in McDonnell Douglas: his membership in the protected class, that he applied

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[4] This is protected activity under both State and Federal Law. California Govt. C., § 3515.5 (representation of employees); 29 U.S.C., § 157 (same).

for the job and was qualified at the Rank 4 level, that he did not receive a full-time job at the FTB,[5] and that the FTB hired 69 applicants from the Rank 4 level who are not black men.[6] Id, p. 27, Excerpt, p. 2574.

b) Factual Background

Belcher-Bey, an African-American male and veteran, competed in the 1994 examination to become a Tax Program Assistant.[7] He earned a 90% score on the exam, which placed him in Rank 4.[8] During the one-year period that applicants could be hired from

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[5] The fact that he declined a position with the Employment Development Department does not detract from his ability to demonstrate a prima facie case because Belcher-Bey has raised a triable issue as to whether the part-time position he turned down was comparable to the full-time FTB position he sought.

[6] The fact that the FTB hired a black man from Rank 4 of the 1994 certification list does not eliminate the fact that Belcher-Bey can show that individuals outside the protected class were hired for the other positions. *See Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1536 (11th Cir. 1984).

[7] The court concedes, "The examination consisted of a structured written exercise and an in-person interview. The score that the interview panelists gave an applicant (plus any veterans preference points) determined the rank in which an applicant was placed on the certification list." Excerpt, p. 2573, fn. 13. However, the Court failed to complete the analysis based on a failure by defendants during discovery to provide the panelist's score, and the score on the written portion. Decl. Lynch, Excerpt, p. 2412: 12-20. See arguments, infra, at page 17.

[8] Belcher-Bey points out that his status as a veteran would have put him in Rank 2, had the paperwork documenting his status been correctly submitted. He states that he did inform the FTB interview panelists that he was a veteran. As a result, it gave him an application for veteran's preference points to submit to the State Personnel Board. He has submitted evidence that he formally established his veteran status with the State Personnel Board in July or August of 1994 (and received written confirmation thereof on November 25, 1996). He claims the State Personnel Board indicated that it would automatically update his score with the FTB.

the 1994 certification list, 153 applicants were hired, including 70 who placed in Rank 4.[9] Of those 70 Rank 4 applicants, 48 had already been non-civil service FTB employees, such as seasonal clerks, student assistants, and youth aides, and three were civil service FTB employees seeking to change career paths. The remaining 19 Rank 4 appointees included one black man. The FTB did not, however, hire Belcher-Bey. Id, pp. 26-27, Excerpt, p. 2573-74.

6. Paul Williams

a) Allegations

Williams claims he suffered disparate treatment at the hands of the FTB in violation of Title VII.[10] In the Complaint, Williams alleges that FTB disparaged him to potential employers who contacted the FTB for references.[11]

b) Factual Background

On July 31, 1992, Williams, an African American male, appointed to a Tax Program Assistant ("TPA") position with Franchise Tax Board ("FTB"). His ap-

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[9] By law, they were limited to the top three ranks. California Govt. Code., §§19057.1, 19057.2.

[10] According to the court, "Williams does not attempt to prove the essential elements of a claim of disparate treatment impact." Excerpt, p. 2588, fn. 4. Again, the court relies on a failure to present statistical evidence, rather than conduct a Pattern Phase inquiry. Appendix, pp. F11, F13, F14.

[11] The court assumed that this claim was abandoned because not raised in opposition. However, the moving parity did not move for summary judgment on this issue, but rather "1. Was Plaintiff Paul Williams performing his job well enough to successfully complete probation?" And, "Did the FTB have legitimate, non-discriminatory reasons for rejecting Plaintiff during probation?" As there was no notice, there was no issue to be decided. The sole undisputed fact raised, # 21, was not relevant to the issue being discussed. Plaintiff Williams' Response to Defendants' Separate Statement of Undisputed Facts, filed 11/2/99, Docket # 316 (hereinafter, RSSUF), p. 3, Issue 2. Excerpt, p. 2350.

pointment was probationary for six months so that he could learn the TPA workload. A probationer who cannot learn the workload is not hired at the end of the probation period. Excerpt, p. 2584

Williams was assigned to the Evaluation and Resolution Unit ("E&R Unit"). This unit was responsible for categories of corporate taxpayers' accounts. Work is distributed among the TPAs by batches called updates. These updates contain 100-300 counts. According to defendants, TPAs were expected to analyze two updates per week.[12] Excerpt, p. 2585.

Leads, technical support employees, and the TPA's supervisors trained the new TPAs. The E&R unit lead, Trisha Mendez, was assigned to Williams and provided him with one on one training for several weeks. She reviewed all the accounts he worked on and identified what additional training he needed.[13] Excerpt, p. 2585.

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[12] There is no foundation that any standards were adopted by CAPA. To that extent, the standards are unenforceable. Furthermore, as a factual matter, the defendants produced no evidence that they had done any studies, and the results of those studied, independent of its evaluation of Williams, and that they had been keeping such business records for a period of time prior to the evaluation of Williams. In short, as the California courts observed, they were in a position to abuse. The trial and appellate court should have, and this court is requested to, strike the evidence as lacking foundation of reliability. FRE, R. 402, 403.

[13] A critical analysis of this statement shows it to be preposterous. If "one-on-one" means what it usually means, that she sat with him through the initial stages showing him how to do the work, then there should have been only a 2% error rate as she caught and corrected Williams on the spot. She cannot claim to have made one-on-one supervision in light of the error rates claimed, or she must concede she herself was not qualified. The internal inconsistency of this statement is bolstered by Williams claims that he was never properly trained, and never treated as others during training sessions, raising a genuine triable issue of fact.

After several weeks of training, Ms. Mendez became concerned because, defendants claim, Williams had trouble learning even the rudiments of the E&R workload. On September 10, 1992, Mendez met with Williams and the E&R supervisor, Patricia Rodriguez, to discuss Williams' progress as of the September 1, 1992 update. Rodriguez memorialized the meeting in a memo indicating areas for improvement and the percentage of errors.[14] See Rodriguez Decl. Exh. 1, Excerpt, p. 2228-31.[15] Later that month, Ms. Rodriguez left the unit, and Michelle Bejarano joined the E&R unit as a supervisor.

Bejarano continued to keep Williams apprised of his performance. Bejarano reviewed several of Williams' updates in September and prepared a report for Williams indicating his error rate and areas in which he needed to improve. The early reports contained

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[14] Defendants' Statement of Undisputed Facts states a range of 4% to 51% error. The court's interpretation of the statistics is an error range of 4% to 63%. In fact, a closer reading of the Updates shows that the true rate was substantially lower. The court should reject the evidence for lack of a foundation of reliability. See footnote 12, supra.

[15] The Court, "Williams objects to the declarations of Mendez, Rodriguez, and Bejarano as so "word-for word identical that they are obviously more than the result of coaching, but in fact were totally created by attorney Kathryn Allen." All three declarants swear that their statements are based upon their personal knowledge, are true and correct, and are made under penalty of perjury. Williams cites no law to support his objection nor does Williams show any facts other than his own conclusory statements that Ms. Allen created the declarations. The declarations are admissible." A closer reading of the declarations, and exhibits in support thereof shows that the evidence are "artifacts." These declarants claim that Williams error rate is not consistent with others or the norm. No job description, policy, or business records were ever produced to support their uncorroborated claimed facts. Indeed, in light of the new evidence, the declarations are simply false. The evidence as lacks foundation for reliability. See footnote 12, supra

input from Mendez and Rodriguez as well as Bejarano.[16] Williams error rate ranged from 11.5% to 50% for the September 10th update and ranged from 1 to 14% for the September 15th and 17th updates. See Bejarano Dec. Exh. 1, 2. Excerpt, pp. 2119-20. His error rate for September 17, 22, and 24, 1992 updates ranged from 1% to 29%. When he was asked to follow up to correct his errors, his error rate was 11.5%. See Bejarano Decl. Exh. 4. Excerpt, p. 2234. His September 29, 1992 error rate ranged from 4%-20%. See Bejarano Decl. Exh. 5. Excerpt, p. 2236. At the end of September, Bejarano prepared a performance evaluation which indicated that his updates had numerous errors and that the acceptable error rate is 2%. She assigned him a score of "does not meet job expectations ("DNM") for quality of work." (sic) See Bejarano Decl. Exh. 3. Excerpt, p. 2232. See footnote 12, supra.

Bejarano continued to review Williams' work, preparing numerous reports indicating error rates and pointing out specific areas in which to improve. In an interim report covering the period October 1, 1992 through November 10, 1992 and again in a scheduled performance evaluation covering October 1, 1992 through November 30, 1992, Bejarano gave Williams a DNM score in the area of quality of work and job knowledge. See Bejarano Decl. Exh. 6, 7. Excerpt 2238 - 2241. Mendez went on vacation in October,

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[16] Bejandro Declaration, exhibit FTB 05014, shows that on a given update, the update was broken down by categories to demonstrate an error rate of 11.5% to 50%. But if we look at the update as a whole, out of 149 transcripts, 48 errors were made for 3.1% Same, FTB 05016, out of a total of 439, there were 39 errors for an error rate of 11.26, rather than the high of 14% claimed. A complete analysis of all the date show that Williams actual error rate is substantially less than reported. Trying to inflate these rates speaks of a state of mind; Weak case, therefore bolster the evidence. Excerpt, pp. 2228 - 2231.

and Williams received another trainer, Tanya Criste.[17] See footnote 12, supra.

In November 1992, Bejarano warned Williams that failure to improve his error rate could result in rejection. His interim report covering the month of December again indicated that he did not meet job expectations with regard to quality of work or job knowledge. He received a score of "needs improvement" in productivity due to a backlog of work and in responsibility because his reworked error rate was 11%. See Bejarano Decl. Exh. 9. Excerpt, p. 2245.Bejarano again warned Williams that failure to improve would result in his rejection.

Although Williams does not dispute the actual numbers and percentages, Williams claims that his error rate was decreasing.[18] He further claims that the high error rates were attributable to making mistakes on small numbers of accounts, thus "resulting in a high error percentage not representative of the relationship between quality and quantity of work performed." See Williams Undisputed Fact 5, excerpt, p. 2344. Tanya Criste, Williams' subsequent trainer, disagreed that a few of the errors assigned to Williams were actually errors.[19]

In January 1993, Bejarano met with Williams and her supervisor to discuss his work performance. Williams was backlogged by eight updates. See Bejarano

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[17] Appellants object. This name neither appears in the Docket nor Defendants list of names. Excerpt, p. 2188-90. At best, it is inadmissible hearsay. FRE, R. 801(c).

[18] At first blush, it would seem silly to attack the error rates because even when cast in their true light, they are high. But there is no reliability to the statistics. See, footnote 12. Moreover, in light of the evidence of discrimination, a clear pattern of discrimination is revealed, and the hostile environment probably made it impossible to concentrate on the work at hand, leading to errors. I.e., he was prevented from learning.

[19] Objection. See footnote **17**.

Decl. Exh. 10, Excerpt, p. 2248. When they met with Williams two weeks later to discuss his progress, he had completed one portion of the update with an error rate of 36%. See Bejarano Decl. Exh. 11, Excerpt, p. 2249.

According to defendants, at the end of his six-month probationary period, Williams never learned the E&R workloads. When he joined the TPA, the accepted error rate was 2%. When compared to peer and group performance however, the actual accepted maximum error rate was 3 to 5%. See Bejarano Decl. ¶ 21.[20] Excerpt, p. 2255. Williams was not performing at such a rate. FTB rejected him. A rejection is not a punitive action; rather, the probation period is considered the final step in an exam. Williams appealed the rejection to the California State Personnel Board. Following a full evidentiary hearing, the Board sustained the rejection. Williams sued.

7. The New Evidence Not otherwise Available.

Unknown to plaintiffs, pursuant to an "agreement between the State and the California State Employees' Association" the JL/MCD Report was published on December 29, 2000. Exh. 1. Excerpt, p. 2354

That report addresses each of the concerns of the plaintiff, producing evidence as to those matters sought, but denied by defendant. JL/MCD, p. 2. Introduction. Excerpt, p. 2357.

8. The New Evidence is corroborated by a Pattern and Practice not available for the Motion on Summary judgment.

Nineteen depositions were taken after the court's ruling. The following significant fact emerged: Supervisors, as a pretext, neither announced a job op-

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[20] Although she claims to have conducted a comparative analysis, she does not provide any documentary evidence of such.

portunity nor conducted any interviews. All they do is confirm that a particular individual is reachable, and that person gets the job. Original Evidence: Jones, p. 2:5-14, Excerpt, p. 603; Springer, p. 608:4-12, Excerpt, p. 608; Gilbert, p. 619:2-12, Excerpt, p. 619; Short, 2:3-11, Excerpt, p. 622; Littlejohn, p. 2, Excerpt, p. 635; Gomez, p. 2:6-16, Excerpt, p. 638; Hollman, p. 2:3-13, Excerpt, p. 643; Johnson, p. 6:2-14, Excerpt, p. 645; Blair, p. 2:6-17, Excerpt, p. 647; Corona, p. 2:4-14, Excerpt, p. 650; Flowers, p. 2:3-10, Excerpt, p. 652A; Gotham, p. 2, Excerpt, p. 633, Sims, p. 2:3-11, Excerpt, p. 615, 616:3-11. Reconsideration Evidence: Deposition of Johnson, 8/4/00, p. 10, Excerpt, p. 2507, at 2509; Flowers, 7/11/00, p. 9:23 – 11:10, Excerpt p. 2475; Corona, 7/11/00, p. 12:4 – 12:19, Excerpt, p. 2467; Cleek, 8/4/00, p. 15:4-15, Excerpt p. 2462; Beach, p. 8/3/00, pp. 12:15 24, Excerpt p. 2454; Marendt, Excerpt, pp. 245:6-12, 1354:# 75.[21]

In addition to the failure and refusal to produce component scores, the witnesses refused to discuss their opinion or the factors they used to score applicants at oral examinations. E.g., Deposition of Jones, p. 17:17 – 24:21, Excerpt p. 2504-05.

The hiring of an Afro-American male is a rare occurrence at FTB. Depo Hellman, p. 28:7 – 29:12 (One in a 12 year career; in the 80s.), Excerpt p. 2499; Depo of Gomez, p. 22:6-15; 24:11-19, Excerpt p. 2490.

9. The New Evidence is corroborated by destruction of the component test scores shortly after the filing of this action.

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[21] She claims to have sent the announcement out. Excerpt, p. 244. But she does not state unequivocally where it was sent. Ibid. She also emailed it to a "department-wide" positing of job opportunities. Ibid. However, she does not claim to have posted it in her work area, or the work area where Oliver worked. Only four responses, two of which 2 were her cronies. Excerpt, pp. 245:8, 1354, # 75.

Some time prior to March 1997, plaintiffs originally sought all documents relating to: (1) Test scores, including the written score, oral score and composite score, by race and sex; (2) adverse actions by race and sex; and (3) complaints arising under Title VII by race and sex. Depo of Moser, p. 39:9-14, Except, p. 2443, at p 2452; Decl. Lynch, excerpt, p. 2512, at 2513:6-19.

During depositions, the EOC officer testified she did not care whether a complaint regarding racial discrimination was supportable, whatever the conduct or graphics, it had to stop even if protected by the 1st Amendment. Depo of Griffin, pp. 50:24-28, 51, 52:20-23, 53:7-27. Excerpt p. 2428, at pp. 2440, 2441. The Chief of Personnel similarly testified. Depo of Moser, p. 35:2-26, Excerpt, p. 2451.

The complaint was filed November 1, 1994. Relevant tests were given in 1995. Depo of Moser,[22] p. 12:10-22, Excerpt p. 2445. Both a written test and an oral test are given, the scores combined, and only the combined score published. Depo, Griffin, p. 21-25, Excerpt p. 2434. The written portion is relevant. Moser, p. 8:4: 12, Excerpt p. 2444; Griffin, p. 38:22-28, Excerpt p. 2437. Management does not get to see the written score. Moser, p. 8:14-28, Excerpt p. 2444. **The written portion for most of the tests is pass/fail, with the final score being the orals**. Id, p. 9:1-12, Excerpt p. 2445. The test scores, written and oral, are preserved for 2 to 4 years. Moser,. p. 14:10-16, 17:27, 19:7-11, Excerpt p. 2446; Griffin, p. 19:13-19, Excerpt p. 2432. Other tests may be weighted 40 written, 60 oral. Depo of Moser, p. 9:1-12, Excerpt p. 2445. The component part scores were never produced. Decl. Lynch. , Excerpt p. 2412.

The FTB EEO works for the Employer not the employee. Griffin, p. 41:22-25, Excerpt p. 24387. FTB

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[22] FTB Personnel Management Bureau, Director of Personnel.

has notice of a potential Title VII lawsuit prior to the filing of this case. Id, 42:13 – 43:20, Excerpt p. 2438.

SUMMARY OF ARGUMENT SUPPORTING CERTIORARI

The issues presented herein raise an important and novel issue of law regarding the extent that terms an conditions of employment may deviate from State Constitutional provisions where the alteration adversely affects and has an adverse impact on minorities in the context of a hostile environment.

In light of, *Clark County v. Breeder,* 532 U.S. 268, in a Title VII case, that an altering of the terms and conditions of employment can be sufficient evidence of disparate impact, the fact that the California Constitution calls for competitive competition for employment hiring and promotion, and the legislature and State Personnel Board manage employment practices in such a manner as to hide objective test scores that permits subjective interview scores to be determinative, then produce ranks with hundreds in each rank, such that in practice the hiring supervisor can hire a particular individual of choice regardless of merit, and minorities have been adversely affected by the system, there is sufficient evidence of "altered terms and conditions of employment" evidence of disparate impact to take to a jury.

In light of *Degen v. United States*, 517 U.S. 820 (1996) a district court in a Title VII case does abuse its discretion in the exercise of its gatekeeper function when it weighs what appears to be credible evidence and ignores other evidence tending to show a practice and pattern of discrimination.

In light of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-660 (1989), a district court in a Title VII case does abuse its discretion by requiring a showing of statistical evidence in the face of 13 declarations by management noting the manner in which candidates

were hired or promoted, and 6 more produced on motion for reconsideration.

Conclusion. Based upon the foregoing, this court should grant the writ of certiorari, and reverse summarily and remand for further consideration, or set the matter for briefing and argument on the merits.

ARGUMENT SUPPORTING CERTIORARI

I

THE ISSUES PRESENTED HEREIN RAISE AN IMPORTANT AND NOVEL ISSUE OF LAW REGARDING THE EXTENT THAT TERMS AN CONDITIONS OF EMPLOYMENT MAY DEVIATE FROM STATE CONSTITUTIONAL PROVISIONS

A. THE HANDLING OF THE OVERWHELMING EVIDENCE OF DISPARATE TREATMENT CANNOT BE RECONCILED WITH THIS COURT'S HOLDINGS

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C., § 2000e-2(a)(1). As this court made clear in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this language "is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. Id., at 64, quoting *Los Angeles Dept. of Water and Power v.* Manhart, 435 U.S. 702, 707 , n. 13 (1978) [*Harris v. Forklift Systems, Inc*, 510 U.S. 17 (1998)] (some internal quotation marks omitted). When the workplace is permeated with "discriminatory

intimidation, ridicule, and insult," *Meritor, supra*, 477 U.S., at 65 , that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Id., at 67 (internal brackets and quotation marks omitted), Title VII is violated. *See also, Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23; *Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998).

Given the 19 declarations and depositions of management that they were handpicking individuals for positions by merely making sure they were on the eligible list, they were able to avoid hiring black males. That fact is amply demonstrated by the lack of advancement for any of the named petitioners, or any black probably since the hiring of Mills in 1987. The treatment of these individuals can be explained as necessary to make them go away, or undermine their credibility as to their eligibility to hide the fact of discrimination.

In rejecting the evidence of alteration of the terms of employment in a disparate impact case it appears that the lower courts either answered a de novo question not previously presented to this court, or in a manner inconsistent with this court's precedents, and therefore requires review by this court.

B. THIS COURT HAS HELD THAT WHILE THE DISTRICT COURT HAS BROAD DISCRETION IN THE GATE KEEPER FUNCTION, IT NEVERTHELESS HAS RECOGNIZED LIMITATIONS ON THAT DISCRETION

In this case, we are presented with the amount of discretion a court had on motions for summary judgment to reject evidence. The norm is that the court does not weigh evidence, unless clearly unreliable, as credibility is for the trier of fact, which in this case would have been a jury as demanded.

In *Swierkiewicz v. Sorema* N.A. (No. 00-1853. February 26, 2002), this court held, "discrimination com-

plaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework, but instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* [*McDonnell Douglas Corp.* v. *Green,* 411 U. S. 792, 802 (1973)] framework--which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination--is an evidentiary standard, not a pleading requirement. *McDonnell, supra,* 411 U.S., at 800. The Court has never indicated that the requirements for establishing a prima facie case apply to pleading."

Then this court reversed *in St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502 (1993) where the district court rejected the employers evidence because "rejection of the defendant's proffered reasons [will permit the trier of fact to infer the ultimate fact of intentional discrimination,] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d, at 493 (emphasis added). But the Court of Appeals' holding that rejection of the defendant's proffered reasons [compels judgment for the plaintiff] disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the "ultimate burden of persuasion."

The court found plausible reasons to reject any and all evidence in support of petitioners' cases, including the statements of management personnel. On reconsideration, it refused to reconsider its handling of the evidence in the face of a management concession that discrimination existed.

This court ought to grant review under this court's supervisory powers because the courts below abused

their discretion in the handling of the evidence, or on the alternative grounds that the court's below departed from controlling precedent from this court.

C. THE COURT'S CONCERN FOR STATISTICAL EVIDENCE IS CONTRARY TO THIS COURT'S HOLDINGS; EVIDENCE OF THE ALTERNED TERMS AND ADVERSE EFFECT WAS OVERWHELMING

Petitioners produced 19 affidavits and depositions from management witness on the selection process, and the lack of hiring and promotion for blacks. It was brought to the court's attention that Respondents destroyed the statistical evidence. They refused to produce the raw scores, showing written scores and oral scores to demonstrate that the process was neutral.

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-660 (1989), a disparate-impact case, this court rejected statistical evidence as the *sine qua non* of discrimination, but rather a tool to discern whether discrimination existed, observing, "it is generally well established that at the justification stage of such a disparate-impact case, the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer. * * * * * A mere insubstantial justification in this regard will not suffice . . . ."

The district court was particularly distressed over what it called a failure of statistical evidence to support petitioner's claims. The holding simply does not square with Wards Cove and its progeny on statistical evidence.

For that reason, this court should grant certiorari to clarify and refine the contours of statistical evidence in Title VII disparate impact cases.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the petition for writ of *certiorari* to the Ninth Circuit and summarily reverse, or set the matter for briefing and argument and then reverse and remand for further procedures not inconsistent with this court's opinion.

Dated: April 26, 2003

RESPECTFULLY SUBMITTED,

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APPENDIX F District Court Denial of Motion for Reconsideration, 7/9/01

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APPENDIX A

NOT FOR PUBLICATION

FILED

JAN 29 2003
CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCELL MILLS, JR., JAMES W. OLIVER JR.; CARL LEE JR.; PAUL E. WILLIAMS; MAURICE BELCHER-BEY,

Plaintiffs - Appellants,

and,

ANTHONY L. BREWER, SR.; MICHAEL MELVIN, VAN P. EVANS, JR.; NANCY GANTZ,

Plaintiffs,

V.

GRAY DAVIS, State of California Governor; GERALD GOLDBERG, Franchise Tax Board Executive Officer; BRAD SHERMAN, Board of Equalization Chairman; RUSSELL S. GOULD, Director of Finance; KATHLEEN O'CONNELL, State Controller; ALLEN HUNTER, Assistant Executive Officer of Franchise Tax Board; WILL BUSH, Assis-

No. 01-17029

D.C. No. CV-94-0 1801 - WBS/JFM

ORDER

tant Executive Officer of Franchise Tax Board; ROBERT BEED1NG, Assistant Executive Officer of Franchise Tax Board; STATE OF CALIFORNIA; FRANCHISE TAX BOARD; ALEECE MARENDT; WAYNE WATANABE; MARIA PORTO; MARJORIE DEQUINCY; ERIC WEST; DENISE SPRINGER; CATHY CLEEK; MARLENE WHITE; BILL SHORT; ANNE ITE ANDERSON,

Defendants - Appellees.

Before: BRIGHT,* HAWKINS and W. FLETCHER, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Hawkins and W. Fletcher have voted to deny the petition for rehearing en banc; and Judge Bright so recommends.

The full court has been advised of the petition for rehearing en bane and no judge of the court has requested a vote cn whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed January 3, 2003, are DENIED.

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX B

NOT FOR PUBLICATION

FILED

DEC 202002

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCELL MILLS, JR., JAMES W. OLIVER JR.; CARL LEE JR.; PAUL E. WILLIAMS; MAURICE BELCHER-BEY,

Plaintiffs - Appellants,

and,

ANTHONY L. BREWER, SR.; MICHAEL MELVIN, VAN P. EVANS, JR.; NANCY GANTZ,

Plaintiffs,

V.

GRAY DAVIS, State of California Governor; GERALD GOLDBERG, Franchise Tax Board Executive Officer; BRAD SHERMAN, Board of Equalization Chairman; RUSSELL S. GOULD, Director of Finance; KATHLEEN O'CONNELL, State

No. 01-17029

D.C. No. CV-94-0 1801 - WBS/JFM

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 3 6-3.

Controller; ALLEN HUNTER, Assistant Executive Officer of Franchise Tax Board; WILL BUSH, Assistant Executive Officer of Franchise Tax Board; ROBERT BEEDING, Assistant Executive Officer of Franchise Tax Board; STATE OF CALIFORNIA; FRANCHISE TAX BOARD; ALEECE MARENDT; WAYNE WATANABE; MARIA PORTO; MARJORIE DEQUINCY; ERIC WEST; DENISE SPRINGER; CATHY CLEEK; MARLENE WHITE; BILL SHORT; ANNE ITE ANDERSON,

Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted December 2, 2002

San Francisco, California

Before: BRIGHT,** HAWKINS and W. FLETCHER, Circuit Judges.

Plaintiffs Marcell Mills Jr., James W. Oliver Jr., Carl Lee Jr., Paul E. Williams, and Maurice Belcher-Bey appeal the district court's grant of summary judgment in their Title VII action alleging that the California Franchise Tax Board ("FTB") and various employees thereof discriminated against them based on their race (African-American) and gender (male). See

** The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

42 U.S.C. § 2000e et seq. They also appeal the district court's denial of their motion for reconsideration. In addition, Mills appeals the district court's grant of defendant Aleece Marendt's motion for summary judgment on Mills' 42 U.S.C. § 1983 claim. After a careful review of the nearly 3,000 page record in this case, we affirm.'

Motion for Reconsideration Based on "New Evidence"

The district court granted summary judgment against plaintiffs Mills, Oliver, Lee, and Belcher-Bey on July 25, 1999, and against plaintiff Williams on November 17, 1999. On May 23, 2001, plaintiffs moved for reconsideration premised on their purported discovery of "new evidence." The "new evidence" consists of the declaration of Laverne Young, a series of depositions, and the December 29, 2000, report of the Joint Labor/Management Committee on Discrimination (the "JLIMCD report"). The district court denied the motion and entered final judgment.

We review the district court's denial of a motion for reconsideration for abuse of discretion. *See Kona Enter., Inc. v. Estate of Bishop,* 229 F.3d 877, 883 (9th Cir. 2000). In order to establish abuse of discretion, the plaintiffs must show: (1) that the proffered evidence was "newly discovered"; (2) that they exercised "due diligence" to discover this evidence; and (3) that the new evidence is "of such a magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208,211 (9thCir. 1987).

The plaintiffs have failed to make this required showing. The declaration of Laverne Young was submitted with the plaintiffs' original papers in opposition to summary judgment. It is thus not "new evidence." Two of the depositions were taken over a year before the district court granted defendants' motions for

summary judgment, and thus are also not "new evidence." The remaining depositions were taken after summary judgment was granted, but are based on declarations that were in the plaintiffs' possession prior to July 25, 1999; plaintiffs offer no justification for their failure to depose these persons earlier, and thus have failed to satisfy their burden of showing "due diligence." The plaintiffs concede that the factual information contained in the JL/MCD report does not constitute "new evidence," but maintain that it represents an admission by the defendants that discrimination exists in State employment, which is new. While this "admission" may be new, it is not of "such magnitude that production of it earlier would have been likely to change the disposition of the case." Id. Although the report indicates that adverse employment actions taken by the State disparately impact African-American, Hispanic, disabled, and male State employees, it does not analyze employment practices at the FTB specifically, the entity whose behavior is challenged in this case.

Summary Judgment

Pattern or Practice

We disagree with plaintiffs' contention that the district court erred in its resolution of their "pattern or practice" discrimination claim. The district court clearly recognized that the plaintiffs' seventh amended complaint alleges, among other things, that the FTB engaged in a "pattern or practice" of discrimination, but explained in its summary judgment orders that the plaintiffs had not "attempt[ed] to prove the essential elements of a claim of disparate impact, i.e., that the defendant uses a particular employment practice that causes a disparate impact." See Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 875-76 (1984) ("Proving isolated or sporadic discriminatory acts by the employer is insufficient to establish a prima facie case of a pattern or practice of discrimina-

tion; rather it must be established by a preponderance of the evidence that racial discrimination was the company's standard operating procedure — the regular rather than the unusual practice." (internal quotation marks omitted)). Plaintiffs argue on appeal that they have indeed presented a viable "pattern or practice" claim — i.e., that the "FTB actively hid objective test scores to hide manipulation of the oral scores, then used the Rule of 3 to pick and choose favorites for promotion, and that this pattern and practice had an adverse impact on black males." They point to their "newly discovered" evidence as supporting this theory. As explained above, this "newly discovered" evidence was properly rejected by the district court, and we therefore cannot consider it here. Even if the evidence were properly before this court, however, summary judgment in defendants' favor would still be warranted.

Plaintiffs have offered no evidence which supports the proposition that the oral interview scores were ever actually manipulated by defendants, let alone manipulated in order to discriminate against black males. Plaintiffs do not claim otherwise, but ask us to draw an inference of intentional manipulation from the defense's failure to produce certain test records during the course of discovery. Darlene Moser, Chief of Administrative Services at FTB, testified that although testing records are generally kept for two years, they are sometimes purged earlier in order to clear storage space. Plaintiffs offer no facts showing that this is not, in fact, what occurred here. We also note that although plaintiffs had ample time to challenge perceived discovery abuses, they raised this issue for the first time in their motion for reconsideration.

Plaintiffs argue that the district court erroneously "insisted" on statistical evidence. This is not accurate. The court merely noted the lack of statistical

evidence as an example of plaintiffs' failure to produce any evidence tending to show a pattern or practice of discrimination. Plaintiffs' argument that they were inhibited from producing statistics due to the defendants' failure to keep Title VII records is likewise without merit. As the district court explained, whether or not the FTB failed to adequately compile data concerning discrimination complaints has no bearing on plaintiffs' ability to produce statistics comparing the number of African-American males hired or promoted within the FTB to the eligible applicant pool.

We note that the plaintiffs' evidence does suggest that the "Rule of 3" provides FTB supervisors with opportunities to select "favorites" for positions within the FTB. Plaintiff Oliver claims when he served on an FTB oral interview panel he was approached by FTB employees desiring to put in a good word for particular applicants, in an attempt (Oliver speculates) to influence his scoring of their interview. But even if we accept the plaintiffs' argument that this evidence tends to show that the FTB hiring procedures are inconsistent with the competitive merit system guaranteed to civil service employees by the California Constitution, it does not create a genuine issue of material fact sufficient to withstand summary judgment in plaintiffs' Title VII race- and gender-based discrimination suit.

Plaintiffs argue that the district court erred by taking judicial notice of FTB rules and their administrative construction, because these rules were not appropriately adopted pursuant to the California Administrative Procedures Act. Nowhere does the record indicate that plaintiffs' raised this objection below. We decline to consider it for the first time on appeal. See Janes v. Wal-Mart Stores, Inc., 279 F.3d 883, 887 (9th Cir. 2002).

PLAINTIFFS' INDIVIDUAL CLAIMS

Plaintiffs contend that the district court failed to consider carefully the evidence submitted in support of

their individual cases. We disagree. Our independent review of the record reveals that the district court did a commendable job sorting through the facts in this case, and that it appropriately considered the evidence in its summary judgment rulings.

1. Marcel Mills

The district court granted summary judgment against Mills on his Title VII claim, finding that Mills had failed to offer "specific and substantial" circumstantial evidence that the defendants' articulated nondiscriminatory reason for terminating his employment was pretextual. After review of the record, we agree with the district court's findings. The FTB contends that it fired Mills because an investigation conducted by Aleece Marendt after Mills' encounter with Diane Nix on July 13, 1995, revealed that several FTB employees feared him.

Mills has offered no material evidence that contradicts this.

Mills contends that the declaration of Laverne Young constitutes specific and substantial circumstantial evidence tending to show pretext, and that the district court improperly invaded the province of the jury by rejecting this evidence. We disagree. In her declaration, Young states that she does not believe that Meshelle Hardin and Diane Nix were intimidated by Mills, based on her observations of their interactions. The district court did not reject this testimony, but rather properly found that it did not constitute "specific and substantial" circumstantial evidence that the defendants' articulated reason for Mills' termination was pretextual. Nothing in the Young declaration contradicts the fact that Marendt honestly and reasonably believed that Mills posed a threat to his coworkers.

Mills also appeals the grant of summary judgment on his § 1983 claim alleging that Marendt violated his Fourth Amendment rights. Mills argues that

the district court erred in finding that he had not opposed the summary judgment motion on this claim. We affirm on the ground that Marendt is entitled to qualified immunity. Mills has not presented any evidence indicating that Marendt violated "clearly established.. . constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Specifically, he offers nothing to defeat Marendt' s reliance on 0 'Connor v. Ortega, 480 U.S. 709 (1987). Mills provides no evidence, beyond mere speculation, to rebut Marendt's claim that she honestly and reasonably believed that Mills might have tax documents in his briefcase that needed to be secured before his departure.

2.James Oliver

The district court carefully evaluated Oliver's claims and found: (1) that Oliver had failed to produce material evidence tending to show that the FTB's articulated reasons for denying him the School Partnership Program, Tax Compliance, and Employees' Advisory Committee positions were pretextual; (2) that he failed to establish a prima facie case of disparate treatment with respect to the SSA and Advisory Committee positions (because he did not apply); and (3) that he failed to establish a hostile work environment claim. On appeal, Oliver again fails to point to any material fact in evidence that would save his claims. Nor has this court been able to find one.

Oliver argues that the district court erred when it excluded on hearsay grounds a comment allegedly made by FTB employee Steve Sims (and recounted by Oliver) to the effect that upper-level managers said that Oliver would have to be treated with "kid gloves" because of his lawsuit. He contends that this comment is not hearsay because it is offered as a verbal act: "Sims was harassing Oliver by making the remark, and therefore [sic] evidence of a hostile environment." However, Oliver's declaration reveals that Sims never

told Oliver about the comment allegedly made by management, and that in fact Sims was Oliver's ally (not his harasser). In his declaration, Oliver refers to testimony that Sims allegedly gave in a deposition. The Sims' deposition transcript itself is not a part of the record, and the district court properly excluded Oliver's statement as inadmissible hearsay.

3.Carl Lee

Lee offers no material evidence to rebut the defendants' articulated nondiscriminatory reason for Lee's demotion and critical work evaluations (i.e., that Lee's poor job performance warranted such actions). Nor does Lee offer evidence to rebut the defendants' claim that he was not promoted to the position of Staff Information Systems Analyst because he was ineligible according to personnel rules. He has also failed to link his supervisor's questions concerning his meetings with his union representatives to racial animus, and has not met his burden of establishing a hostile work environment.

4.Maurice Belcher-Bey

Belcher-Bey contends that the FTB's failure to select him for employment from the applicable civil service list generated in 1994 was discriminatory. The district court granted summary judgment against Belcher-Bey, explaining that "[f]or some of the positions, he [was] unable to show that the hiring decision-makers knew the race of the applicants," and "[f]or the other positions, he [could not] rebut defendants' legitimate, nondiscriminatory reasons." On appeal, Belcher-Bey points to no material evidence to contradict the district court's careful findings. His reliance on certain "new evidence" is misplaced because, as explained above, the district court properly rejected this evidence as untimely. In any event, such evidence does not raise a genuine issue of material fact that would save Belcher-Bey's claims.

5.Paul Williams

Williams claims that the FTB violated Title VII when it failed to hire him to a permanent position after his probationary period. Defendants presented evidence that Williams was not hired because he failed to meet appropriate work quality standards. Williams does not provide any contrary material evidence.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFF D. PAIGE, individually & on behalf of others similarly situated,

Plaintiffs - Appellants,

and,

ANTHONY L. BREWER, SR.; MICHAEL MELVIN, VAN P. EVANS, JR.; NANCY GANTZ,

Plaintiffs,

V.

v.

STATE OF CALIFORNIA; CALIFORNIA HIGHWAY PATROL; EDWARD RICHARD GOMEZ; DWIGHT HELMICK, Commissioner of California Highway Patrol,

Defendants-Appellants,

And

Business, TRANSPORTATION & HOUSING AGENCY, of the State of California; MAURICE NMI HANNIGAN, in his official capacity as Commissioner of the California Highway Patrol,

Defendants..

No. 01-553 12

D.C. No.

CV-94-00083 CBM

ORDER AND AMENDED OPINION

Appeal from the United States District Court
For the Central District of California

Coseulo B. Marshall, District Judge, Presiding

Argued and Submitted

January 23, 2002 – San Francisco, California

Filed May 31, 2002
Amended July 18, 2002.

Before: Stephen Reinhardt, Alex Kozinski and Michael Daly Hawkins, Circuit Judges

Opinion by Judge Reinhardt

COUNSEL

Joel M. Cohn, Esq., Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for the defendants-appellants.

Della Bahan Esq., Bahan & Associates Pasadena, California for the plaintiff-appellee.

ORDER

The opinion filed May 31, 2002, is amended as follows:

1. At page 7951 of the slip opinion,, delete the last sentence of the first full paragraph 'and the two subsequent paragraphs.

2. At page 7951 of the slip opinion, add to the end of the first full paragraph (following "liability period"):

However, we have held that it is appropriate to admit pre-liability period data into evidence in a disparate impact case if promotional practices remain similar over a long period of time, as they have in this case. See, e.g., Bouman v. Block, 940 F.2d 1211, 1226(9th Cir. 1991) (allowing plaintiffs in a Title VII disparate impact ease to aggregate results from multiple promotional exams because "courts have repeatedly looked at trends from past examinations to see if

the total pass rate showed evidence of discrimination"); Eldredge, 833 F.2d at 1339 n.7 (finding data in a Title VII disparate impact case "more complete and reliable" when aggregated over nine years than when shown year-by-year); see also 28 C.F.R. § 50.14 at § 4(d) (1977) (stating that in a Title VII disparate impact case, when the data indicate that a procedure has discriminatory impact, but the data set is too small to be reliable, plaintiffs may supplement data with evidence concerning the impact of the procedure over a longer period of time). We agree with the district court that pre-liability period data may properly be included in the statistical analysis in this case.

3. At page 7952, line 25 of the slip opinion, delete "under the continuing violation theory."

4. At page 7953, line 14 of the slip opinion, replace "Bowman v. Block: 940 F.2d 1211, 1228 (9th Cir. 1991)" with "Bouman, 940 F.2d at 1228."

With these amendments, the panel has voted to deny the Petition for Rehearing and Petition for Rehearing En Bane.

The full court has been advised of the Petition for Rehearing En Bane and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35.

The Petition for Rehearing and Petition for Rehearing En Banc are DENIED.

OPINION

REINHARDT, Circuit Judge:

This case has a long and difficult history. The allegations are serious; the plaintiffs, highway patrol officers who are members of racial minorities, allege that their employer, the California Highway Patrol ("CHP"), maintains a promotional process that discriminates against them on the basis of race. The district court and this court have struggled with the issues involved, both because of the nature and importance of the allegations, and the complex legal and factual issues involved in racial discrimination cases.

In 1994, Jeff D. Paige, a black CHP lieutenant, brought this class action pursuant to 42 U.S.C. § 1983 on behalf of all current and future non-white CHP officers. He alleged that the promotional process of the CHP has a discriminatory impact on non-white officers in violation of Title VII of the 1964 Civil Rights Act. After a lengthy discovery period and a great number of submissions, the district court found that the CHP's promotional process resulted in a disparate impact on

the plaintiff class and, accordingly, granted partial summary judgment for the plaintiffs. The CHP appealed, and we reversed and remanded for further factual findings. See Paige v. State of California, 102 F.3d 1035 (9th Cir. 1996); Paige v. State of California, No. 95-56669, 1996 WL 740839 (9th Cir. Dec. 20, 1996) (unpublished memorandum disposition) [hereinafter collectively referred to as Paige IJ. Upon remand, the district court ordered additional discovery, and again granted partial summary judgment for the plaintiffs. The CHP again appealed, and again we consider the issues.

Background Facts

As of December 31, 1993 (the last reporting date prior to the filing of the lawsuit); the CHP employed approximately 5,675 officers, approximately 1,119, or 19.7%, of whom were officers of color. Only 102 of these non-white officers were in positions above the entry-level rank; they constituted approximately 11.1% of the total number of officers in supervisory positions. In contrast, non-white officers comprised approximately 20.9% of the CHP officers in non-supervisory positions.

In order to become a peace officer with the CHP, an applicant must first be hired as a cadet and complete a six month training program. Thereafter, the successful applicant is assigned to an entry-level peace officer position. An officer may subsequently apply for a promotion in rank and advance to sergeant, lieutenant, captain, assistant chief, and finally to deputy chief. No outside hiring occurs beyond the entry-level position.

In order to be eligible for promotion, an officer must pass a promotional examination.[1] There is a different examination1process for each supervisory rank.

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1 During the period relevant to this lawsuit, the examinations were given approximately every two years. The questions differed

For example, the exam for the sergeants rank includes an oral and written component whereas that for the position of assistant chief is oral only.[2] Although certain ranks may share the same examination format, the exam for each rank is comprised of different questions and covers different exam topics. Written exams generally consist of a multiple-choice component and an essay component. The oral exam is labeled a "qualifications appraisal interview." For the exams with a traditional written and oral component (sergeants and lieutenants), the applicants' are notified by letter after the written portion that they either passed or failed. Only if they passed are they permitted to take the remainder of the exam.

When the promotional examinations are completed, an eligibility list is compiled. The eligibility list is a list of the successful applicants, ranked according to their "weighted composite score" on the completed exam. As vacancies in the supervisory ranks occur, officers are promoted in the order in which their names appear on the eligibility list. The list is used only until new exams are conducted at which time a new List is created.

Analysis

[1] In order to make a prima facie case of "disparate impact" under Title VII, the plaintiffs must

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each time the exams were administered. Although individuals who reach the higher supervisory ranks may apply for the position of Chief, there is no promotional exam for that position, and the record does not reflect whether outside candidates are eligible to apply.

[2] During the relevant period of time for this lawsuit, the sergeants and lieutenants promotional exams were comprised of a written and oral component; the captains exam consisted of an "in-basket" exercise and an oral interview; and the assistant chiefs and deputy chiefs exams consisted of oral interviews only. An "in-basket" exam is a written exam in which the applicants write answers to hypothetical problems that they may confront in their future employment

show "that a facially neutral employment practice has a 'significantly discriminatory' impact upon a group protected by Title VII."[3] *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 481 (9th Cir. 1983); *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46 (1989). This showing consists of two parts: the plaintiffs must demonstrate 1) a specific employment practice that 2) causes a significant discriminatory impact. *Wards Cove Packing Co.*, 490 U.S. at 656-67; *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988). Statistical evidence is used to demonstrate how a particular employment practice causes a protected minority group to be underrepresented in a specific area of employment (for example, hiring or promotion). *See Watson*, 487 U.S. at 994. The statistical analysis must show a disparity that is "sufficiently substantial" as to "raise such an inference of causation."[4] *Id.* at 995.

[2] In evaluating the impact of a particular process, we must compare the group that "enters" the process' with the group that emerges from it. Here, the plaintiffs challenge several parts of the promotional process of the CHP as having a disparate impact on non-white officers. Ordinarily, we would analyze this claim by determining whether the group of officers that received promotions looks statistically different from the group that applied for such promotions — that is, we would compare the racial composition of

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[3] We review the district court's conclusion as to a *prima facie* case of disparate impact de novo but review the underlying findings of fact for clear error. *See Tiano v. Dullard Dept. Stores, inc.*, 139 F.3d 679, 681 (9th Cir. 1998). In particular, we give deference to a district court's findings regarding statistical evidence. *See Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 312 (1977).

[4] A plaintiff need not prove discrimination with "scientific certainty"; he must, however, prove any such charge by a preponderance of the evidence. *Eldredge v. Carpenters 46 N. CaL Counties Joint Apprenticeship and Training Comm.*, 833 F.2d 1334, 1338 (9th Cir. 1987) (quoting *Bazemore v. Friday*, 478 U.S. *385* (1986))

the officers who are appointed to supervisory positions as a result of a challenged examination with the racial composition of the officers who applied for promotion to those positions. We have previously stated that "[t]he best evidence of discriminatory impact is proof that an employment practice selects members of a protected class. in a proportion smaller than in the actual pool of eligible employees." *Moore*, 708 F.2d at 482. However, we have also stated that this general principle is true only if there is not "a characteristic of the challenged selection device that makes use of the actual pool of applicants or eligible employees inappropriate." *Id.*

Here, the parties do not dispute that the officers who successfully made it to the CHP supervisory ranks constitute one group for comparison. The parties do dispute, however, the group to which this first group should be compared ("the comparative group"). The defendants argue that we should conduct our statistical analysis as we ordinarily would in a promotion case and use an "internal pool" (the actual pool of promotional applicants) as the comparative group. In contrast, the plaintiffs argue that an internal pool is not appropriate because the CHP's discrimination in hiring renders that pool an inaccurate reflection of the number of qualified non-white candidates who *should* be eligible, and *would* apply, for promotions. Accordingly, the plaintiffs argue that an "external pool" should be used -- that is, a pool consisting of similarly skilled peace officers in the state of California.[5]

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[5] The "external pool" is defined by the categories, of the 1990 California Census that correspond to the similarly skilled positions in the CHP. According to the census, the state-wide percentage of non-white "Supervisors, Police and Detectives" (census code 414 — supervisory positions) is 23.1%. The state-wide percentage of non-white "Police and Detectives, Public Service" (census code 418 — non-supervisory positions) is 28.8%. The district court adopted the 1990 California Census codes as the appropriate measurements of qualified non-white applicants for the supervisory CHP

Prior to *Paige I,* the district court concluded that an external rather than internal pool was the appropriate comparative group to use in this case. On appeal, we held that the district court made insufficient factual findings to justify that conclusion. Accordingly, we remanded for further findings as to which type of pool was appropriate for use in this case and whether, using whichever pool was appropriate, a disparate impact had been demonstrated. After further discovery, the district court again found an external pool to be the appropriate comparative group., and again found a disparate impact. It found that the use of the internal pool was inappropriate because of barriers to the hiring process that resulted in an under representation of non-whites in the group eligible to apply for promotions.

[3] Much of this case's history has concentrated on the debate over the use of an external versus internal pool. We may have inadvertently contributed to this diversion from the controlling issues. In *Paige I,* in holding that the use of the external pool was unjustified on the record before us, we stated that "[there was no evidence offered that the CHP discriminated in hiring, or of any employment practice that deterred non-white, non-supervisory employees from applying for promotion." *Paige 1,* 1996 WL 740839, at *2. The parties and the district court then devoted their efforts in large part to examining whether the CHP engaged in

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positions.

With regard to the internal pool, of the 2,842 officers who applied to be promoted, 572, or 20.10%, were non-white. Thus, the difference between using an internal and an external pool is that in the former case, non-whites would constitute 20.1% of the total number of (actual) applicants and in the latter, 28.8% of the total number of (potential) applicants. The internal pool would, of course, vary depending on the aspect *of* the promotional process challenged For example, if the analysis focused solely on the sergeants written exam, the internal pool would consist of the officers who applied for promotion to the sergeants rank.

discriminatory hiring at the entry-level and assessing the appropriateness of using an external pool. However, at the time of *Paige I*, the district court had not yet made a critical ruling that turns out to be determinative of the appropriate comparative group issue. Following our remand in *Paige I*, the district court held that, in light of the limited nature of their pleadings, the plaintiffs lacked' standing to challenge the "closed promotion process" of the CHP. This ruling, which plaintiffs do not contest on appeal, leads to the inevitable conclusion that the use of an external pool in this case is inappropriate.

The district court's standing ruling was issued in response to the plaintiffs' efforts to invalidate the CHP's practice, pursuant to Cal. Veh. Code § 2251, of promoting only from within, as opposed to allowing officers from other police departments to apply for CHP supervisory positions. Obviously, as the district court noted; hiring only from within could not harm the plaintiffs, who are all members or future members of the CHP. In fact, prohibiting outside competition and thereby limiting the numbers of persons eligible to seek supervisory positions to those in the plaintiff class could only benefit the class members and improve their chances for promotion. As the district court explained, "[p]laintiffs are not subject to the Limitations of § 2251 because, as members of the CHP, they are eligible to apply for supervisory vacancies." It therefore found that they lacked standing to challenge the practice. In short, the district court held that the plaintiffs may only challenge the aspects of the promotional process *that adversely affect them*, and that a closed promotional process causes them no injury.

[4] The use of an external pool might well be appropriate in a case in which the plaintiffs are free to challenge the validity of a closed promotional process and to seek relief in the form of an order requiring that candidates both from within and without an em-

ployer's ranks be allowed to compete for supervisory vacancies. In that circumstance, the court would have to determine whether the employer's closed promotional process served to limit disproportionately the number of nonwhites who obtain supervisory positions with the employer, and accordingly, the comparative group would consist of all potential applicants. Where, however, as here, the plaintiffs are by class definition all members of the CHP who may only contest the aspects of the closed promotional process that adversely affect their own opportunities for promotion, the only relevant question is whether the examination process 'adversely 'affects non-white as compared to white CHP officers. In other words, does the challenged practice favor white officers over non-white officers? To answer this question, an internal pool —the pool of all officers who apply for promotion —constitutes the appropriate comparative group.[6]

[5] In sum, we hold that an internal pool is the proper comparative group for use in determining whether the various parts of the CHP's promotional process have a disparate impact on non-white officers.[7] Although this holding requires us to reverse the

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[6] The plaintiffs have not offered any evidence to suggest that non-white officers who are eligible for promotion are dissuaded from actually applying for these promotions. Therefore, the pool of actual applicants is appropriate for statistical analysis as opposed to using the pool of officers who are *eligible* to apply.

[7] The fact that the plaintiffs in this case are required to contest particular aspects of the promotional process comports with the general rule that, unless the factors are incapable of separation, a plaintiff must demonstrate that a particular factor or aspect of a decision making process has a disparate impact *See Watson*, 487 U.S. at 994; *Stout v. Potter*, 276 F.3d 1118, 1124 (9th Cir. 2002) (stating that plaintiffs generally cannot attack overall decision making process, rather they must identify a particular element or practice); *see also* 42 U.S.C. §§ 2000e-2(kX1XAXi) and (B)(i). *But see Powers v. Alabama Dept. of Educ.*, 854 F.2d 1285, 1293 (11th Cir. 1988) ("[P]laintiff~ alleging class-wide discrimination in promotions are not required to isolate the particular aspect

district court's grant of summary judgment for the plaintiffs, it does not require us to direct that summary judgment be awarded to the defendants. Instead, we must ask which parts of the promotional process, if any, have a disparate impact on non-white officers. This can only be answered by employing a statistical analysis based on the proper comparative group. Because the parties offer conflicting inferences drawn from the evidence they each offered as to whether the use of an internal pool shows such a discriminatory effect, there is a genuine dispute of material fact as to whether the promotional exams have a disparate impact, and this action must proceed to trial.[8]

There are, however, questions of law bound up in these factual questions. In order to give guidance to the parties and the district court, and because this case was filed eight years ago and has been before this court twice already, we address these issues now. The defendants challenge the validity of the plaintiffs' statistical analyses in three ways: First, the defendants argue that the plaintiffs improperly aggregate data from the various written examinations; second, they contend that the plaintiffs erroneously group all non-

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of the promotional process that is responsible for the discriminatory impact.").

[8] It appears from the district court's order that the judge may have already considered some of the plaintiffs' data in which they used an internal pool for their statistical analysis. The district court stated that it granted partial summary judgment for the plaintiffs "on the issue of disparate impact resulting from the use of written examination for promotional eligibility." However, such a conclusion would not be possible using an external pool because the external pool data is not subdivided according to various types of examinations. Nevertheless, the district court explicitly stated that an external pool was the appropriate measure for determining disparate impact in this case. If only because of this internal inconsistency, we cannot affirm the district court's grant of summary judgment in favor of the plaintiffs on the alternate ground that it is supported by statistical data based on the use of an internal pool.

white officers together rather than analyzing the data according to each separate minority group; and third, the defendants argue that the plaintiffs may not include data from before the beginning of the liability period.

With regard to the first two arguments against the aggregation of data, it is a generally accepted principle that aggregated statistical data may be used where it is more probative than subdivided data. *See Eldredge v. Carpenters* 46 *N. Cal. Counties Joint Apprenticeship and Training Comm.*, S33 F.2d 1334, 1339-40 mi.7&8 (9th Cir. 1987). Such use is particularly appropriate where small sample size may distort the statistical analysis and may render any findings not statistically probative. *See Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324, 340 n.20 (1977); *Stout v. Potter,* 276 F3d 1118, 1123 (9th Cit. 2002). Indeed, some commentators suggest that stratification should be upheld only if the employer can demonstrate that "the stratification is appropriate, and that the stratifying variable is business justified." Ramona L. Paetzold & Steven L. Willborn, The Statistics of Discrimination § 5.08 at *35* (1996 & Supp. 2001).

The defendants first argue that the plaintiffs improperly group data from the various written exams for the supervisory ranks.[9] The district court found aggregation of the supervisory positions to be more pro-

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[9] The defendants also contest categorizing the "in-basket" captains exam as a written examination. However, the defendants' own witness, the Commander of the CHP's Selections and Examination Section, made clear that the in-basket exam is a written exam. He described the captains examination process as follows: "Candidates are required to respond in writing to the problems contained in the in-basket exercise. These written responses are evaluated for technical content and writing proficiency by panel members of the qualifications appraisal oral interview that follows the in-basket exercise." Thus, it is clear that the in-basket exam qualifies as a written exam.

bative than subdivided data. We agree. The plaintiffs demonstrated, by pointing to the State Personnel Reports, the Census reports, and the CHP's own descriptions of the positions, sufficient commonality among the duties and skills required by the various supervisory positions to justify aggregation. The defendants themselves group the supervisory positions together for purposes of their reports to the State Personnel Board and the EEOC. Additionally, aggregation of similar employment positions has been done in other Title VII race discrimination cases. *See Hazelwood,* 433 U.S. at 308 n.13 (aggregating various types of public school teacher positions for purposes of analysis); *Simmons v. City of Kansas City,* No. CIV.A.88-2603-0, 1992 WL 403096, at *6 (D. Kan. Dec. 7, 1992) (upholding statistical analysis that grouped testing procedures for all supervisory ranks of police department).

Second, the defendants contest the district court's ruling that aggregating non-white officers resulted in more probative data than would dividing them according to individual minority groups. Again, we agree with the district court. In general, "the plaintiff should not be required to disaggregate the data into subgroups which are smaller than the groups which may be presumed to have been similarly situated and affected by common policies." *Eldredge,* 833 F.2d at 1340 n.8 (quoting D. Baldus & J. Cole, Statistical Proof of Discrimination § 7.0-7.2 (1980 & 1986 Supp.)). Here, plaintiffs' theory is that the employment practices have the identical discriminatory effect upon members of all minority groups, and that those practices unlawfully benefit solely the members of the white majority. Right or wrong, they are entitled to attempt to prove their case. In addition, the defendants have not put forth any evidence that certain minority groups should be evaluated differently than others or that the promotional process has treated particular minority groups differently. *Cf Rich v. Martin Marietta*

Corp., 522 F.2d 333, 346 (10th Cir. 1975) (holding that inclusion of "Orientals and American Indians" was not appropriate because they were not similarly situated in terms of numbers in upper echelon of the labor force). Finally, the defendants have not presented any evidence that suggests that the stratification of data on the basis of particular minority groups is business justified.[10]

The defendants' final argument regarding plaintiffs' statistics is that the plaintiffs erroneously rely on data taken from examinations and corresponding eligibility lists that expired before the start of the liability period. However, we have held that it is appropriate to admit pre-liability period data into evidence in a disparate impact case if promotional practices remain similar over a long period of time, as they have in this case. *See, e.g., Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991) (allowing plaintitt~ m a Title VII disparate impact case to aggregate results from multiple promotional exams because "courts have repeatedly looked at trends from past examinations to see if the total pass rate showed evidence of discrimination"); *Eldredge*, 833 F.2d at 1339 n.7 (finding data in a Title VII disparate impact case "more complete and reliable" when aggregated over nine years than when shown year-by-year); *see also* 28 C.F.R. § 50.14 at § 4(d) (1977) (stating that in a Title VII disparate impact case, when the data indicate that a procedure has discriminatory impact, but the data set is too small to be reliable, plaintiffs may supplement data with evidence

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[10] As additional support for the aggregation of the statistics concerning non-white officers, we note that the class was certified as a class of "nonwhite" officers and the CHP did not contest this aspect of the certification. See Paige 1, 102 F.3d at 1042 (affirming use of class-based action and stating how case would look at use of race in all applications for promotions); see also Wards Cove, 490 U.S. at 647 (action in which plaintiff class comprised of all non-white workers); Domingo v. New England Fish Co., 727 F.2d 1429, 1442 (9th Cit. 1984) (same).

concerning the impact of the procedure over a longer period of time). We agree with the district court that pre-liability period data may properly be included in the statistical analysis in this case.

In sum, we reject the defendants' three arguments contesting certain aspects of the plaintiffs' statistical analyses. The plaintiffs may aggregate data from the various supervisory written examinations and may group all non-white officers together for comparison purposes. Additionally, "pro-liability period" data may be included in the statistical analyses. The defendants are of course equally free to introduce whatever data they may deem to be appropriate, subject to the further rulings of the district court.[11]

The defendants also argued before the district court that even if its promotional process did have a disparate impact on non-white officers, the process "fulfill[s] a genuine business need" and is therefore job related and permissible under Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424,432(1971); *see also* 42 U.S.C. § 2000e-2(k)(IXA)(i). We agree with the district court that the CHP failed to show an appropriate validation of the promotional process as a whole or of its individual parts, in part because it did not present any evidence regarding how the examinations actually test for the skills identified by the CHP as critical to performing well in a particular supervisory rank. *See Griggs*, 401 U.S. at 432; *Assoc. of Mexican-American Educators v. State of California*, 231 F.3d 572, 585 (9th Cir. 2000)

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[11] On summary judgment, the plaintiffs presented statistical analyses using an internal pool in support of their contentions as to the disparate impact on non-white officers of (a) the sergeants written examination standing alone; (b) the sergeants, lieutenants, and captains written examinations combined; and (c) the use of a weighted composite score for determining the eligibility lists for the sergeants rank. Upon remand, the plaintiffs are not limited to challenging these aspects of the promotional process but may offer appropriate statistical evidence regarding any of the classifications or examinations involved.

(en banc); *Bouman*, 940 F.2d at 1228. Therefore, on the record before us, the defendants have failed to meet their burden of production demonstrating that the promotional process is "job related."

Because we hold that an external pool is not the appropriate comparative group for determining disparate impact, the summary judgment in favor of the plaintiffs cannot stand. We also hold that the defendants have failed to demonstrate that the promotional process at issue fulfills a genuine business need; thus, they also are not entitled to summary judgment. Genuine issues of material fact remain. We therefore remand for trial at which time the parties may submit appropriate statistical and other evidence in light of our holding. We also vacate the injunction issued by the district court because it was based in part on its granting of summary judgment to the plaintiffs and its finding of disparate impact using an external pool. We express no view as to whether injunctive relief would otherwise be appropriate.

REVERSED AND REMANDED

APPENDIX D

NOT FOR PUBLICATION

FILED

SEP 23 2002

CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCELL MILLS, JR., Plaintiffs - Appellants, v. GRAY DAVIS, et al,.	No. 01-17029 D.C. No. CV-94-0 1801 - WBS/JFM

ORDER

Appellants' request for judicial notice and suggestion for supplemental briefing is DENIED.

FOR THE COURT
CATHY A. CATTERSON
CLERK OF COURT
By:____
Howard Horn
Deputy Clerk

APPNDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

---cOo----

BEFORE THE HONORABLE WILLIAM B. SHUBB,
CHIEF JUDGE

---oOo---

MARCELL MILLS, JR., et al.,	No. Civ. S—94-1801
Plaintiffs	
vs.	
CALIFORNIA STATE FRANCHISE TAX BOARD, et al.,	
Defendants	

---oOo---

REPORTER' S TRANSCRIPT
MOTION FOR SUMMARY JUDGMENT
MONDAY, JULY 12, 1999

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Reported by:
KELLY O'HALLORAN, CSR #6660
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th Cir Expert of Record, page 2515

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BY: CATHY A. NEFF
JACOB A. APPLESMITH
KATHRYN ALLEN

under Clark vs. Claremont and also the other cases where they rely specifically upon a decision-maker for making their determination at a later date, the race affected the decision-making process. At the very first level, there's an examination. And in the examination, there are oral interviews that are done. And at the oral interviews, they see the applicants and they're able to designate their race. At that level they do an evaluation that sets them on a ranking system, and the ranking system is what is relied upon by the individuals who select individuals to be placed in specific positions. So there's a Rank 1, a Rank 2, a Rank 3, and a Rank 4.

Mr. Belcher—Bey, there's a conflict in relationship to what rank he was in. We claim that he was in Rank 2, ranked 2 because of preferential Veteran's points. And even if he was in Rank 3, he's still reachable under the rank of 3 when Rank 1 is cleared. When Rank 1 is cleared, then they go to Rank 2, 3, and 4. So all appointments out of Rank 2, 3 and 4, if it's believed by the jury that he ~as in Rank 4, are all appointments to which he could have been placed in.

THE COURT: Did you hear my question?

MR. HARRIS: Yes, I did.

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knowledge of any protected activity on his part.

THE COURT: You know, it's funny. Again, there's a lot to go over there, but this sounds like a totally different case than the one that was briefed. The issues that I was prepared to address are not even some of the same issues that both of you have raised here. It's very discouraging.

MR. PARKER: Your Honor, if you would perhaps tell us what issues you want us to address.

THE COURT: No, because they're issues that you don't address.

MR. PARKER: Can I respond to the comment

THE COURT: I'll tell you. I thought that you had an issue in here about denying him training opportunities, constructive discharge, hostile work environment, retaliation for filing his complaints, the whole issue of the treason accusation, due process.

It's hopeless to deal with these on summary judgment. It's just hopeless. Because what happens is I try to figure out what the issues are, I address them, and then you just take whatever I do and you take that up to the Court of Appeals and argue whatever you say I missed. And it's impossible to hit all the issues in a stack of papers four—feet high. Impossible. So it's just almost a useless act to try to resolve these on

summary judgment.

MS. NEFF: I understand that it is very dif-fic8ult, your honor.

THE COURT: It's not just difficult. It's futile. I had a law clerk spend two full weeks on these. One law clerk, two full weeks. Didn't even come close to the issues that you raised here in oral argument. And so you'll just have to do it on appeal, or else I have to deny the motion and we go to trial. Then we do have a record that everybody can see. But it's just impossible. Impossible.

MS. NEFF: I don't understand the problem in this particular case.

THE COURT: Well, the problem is I don't understand the issues. That's the problem. I've just told you what I thought the issue were, and they're not the issues that you just addressed.

What I'll do is I'll get a transcript of what your said the issues are, and I'll go back and I'll try to address those issues instead of the issues that I thought were in this case.

MS. NEFF: Well, I'm thinking that maybe there's some confusion. I understand that you have six –

THE COURT: Are we talking about Evans?

MR. PARKER: We're talking about Evans.

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MS. NEFF: Yes we are.

THE COURT: Okay.

MS. NEFF: From what you 're telling us, it sounds to me like another case.

THE COURT: That's exactly right. That's exactly right.

Is this Evans?

THE LAW CLERK: Yes.

MR. PARKER: Your Honor, defendants framed the issues by bringing the motion the way they brought it. That was of the complaints that I had, was that he has brought a much broader claim, but in the summary judgment motion, they're saying he's limited to this and this. That was addressed by his responsive papers, but he also addressed what actually his claim is and what he's alleging.

And based on their moving papers alone, they don't address all the plaintiff's issues and wouldn't be entitled to summary judgment for that basis.

But in addition, counsel determines what are going to be asked at the deposition. If she asks a question in a certain fashion and she doesn't answer she wants, she cannot complain and say, didn't tell me this at the deposition, and you didn't tell me this. And the fault lies with the way she asked

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the question.

In addition, the fact that some information is given in a deposition and some information is not given at a deposition doesn't make it contradictory. It just means that he responded to the question the best way he could or he rambled.

THE COURT: The problem is you're addressing something that I don't even know anything about. So it's going over my head.

MS. NEFF: There is –

THE COURT: Hold on a second. I'm going to see if I can find this motion.

All right. I'll take it under submission.

MS. NEFF: Thank you, your Honor.

THE COURT: I'll take all these under submission. I'll rule on some and do the best I can on the others.

MR. HARRIS: Your Honor.

THE COURT: Yes.

MR. HARRIS: On the Brewer case, I notice in their response they indicated that we didn't file a statement in opposition to this defendant's separate statement of undisputed facts. And I looked, and in my file I have a file endorsed copy indicating that we did file that. And I asked Mr. Applesmith about it today, and he indicated to me that he didn't have that. And I'm

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APPENDIX F

FILED

JUL -9 2001

CLERK, U.S. DISTRICT COURT

By _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORIA

MARCEL MILLS, JR., ANTHONY L. BREWER, SR., PAUL E. WILLIAMS, MICHAEL MELVIN, CARL E. LEE, JR., MAURICE E. BELCHER—BEY, VAN P. EVANS, JR., JAMES W. OLIVER, JR., individually,

Plaintiffs,

v.

FRANCHISE TAX BOARD, et al.,

Defendants.

No. CIV S-94-1801 WBS/JFM

MEMORANDUM AND ORDER

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Plaintiffs Mills, Oliver, Lee, and Belcher—Bey move for a new trial or reconsideration of the court's July 25, 1999, order granting defendants' motion for summary judgment, based on newly discovered evidence. Plaintiff Williams moves for a new trial or reconsideration of the court's November 17, 1999, order granting defendants' motion for summary judgment, based on the same newly discovered evidence.

I. Procedural Background

Plaintiffs are current and former employees of the Franchise Tax Board ("FTB"), joined by an unsuccessful applicant for employment with the FTB. Each plaintiff alleges that the FTB violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et sect. In addition, Mills, Evans, and Brewer claim that various individual defendants are liable under 42 U.S.C. § 1983 for violations of their constitutional rights.

A. The July 25 Order

On July 25, 1999, this court granted defendants' motion for summary judgment against plaintiffs Mills, Oliver, Lee, and Belcher-Bey ("July 25 Order"). This court also granted defendant West's motion for summary judgment against plaintiff Evans' section 1983 claim, and defendant Goldberg's motion for summary judgment against plaintiff Brewer's section 1983 claim.

On August 26, 1999, plaintiffs Mills and Oliver appealed the July 25 Order to the Ninth Circuit. On September 10, 1999, plaintiff Belcher-Bey also appealed the July 25 Order to the Ninth Circuit.

Plaintiffs Mills and Oliver's appeals were dismissed from the Ninth Circuit on November 17, 1999 for lack of jurisdiction. The Ninth Circuit found that the July 25 Order was not a "final order" under Rule 54(b), and thus was not an appealable order.[1] Two

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[1] "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and li-

days later, plaintiff Belcher-

abilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudication all of the claims and the rights and liabilities of all the parties." 28 Fed. R. Civ. P. 54(b)

Bey's appeal was dismissed from the Ninth Circuit, also for lack of jurisdiction.

B. Motion to Enter Judgment

On August 26, 1999, defendants moved this court to enter judgment on the July 25 Order. On September 28, 1999, this court denied defendants' motion, without prejudice, on the grounds that defendants failed to support their motion with legal authority and failed to notice the law and motion calendar pursuant to Local Rule 78-230. In order to properly determine whether entry of judgment was timely or warranted under Rule 54(b), the court invited defendants to file a new motion, properly noticed and properly supported. Defendants did not file a second motion, and, to date, final judgment has not been entered.

C. Disposition of Plaintiffs' Remaining Claims

On November 17, 1999, this court granted defendants' motion for summary judgment against plaintiff Williams. On December 17, 1999, this court granted defendant Watanabe's motion

for summary judgment against plaintiff Brewer's section 1983 claim on the ground of qualified immunity. Then, on March 27, 2001, this court signed a stipulation and order dismissing the remainder of plaintiff Brewer's claims. Consequently, the only plaintiff with existing claims is plaintiff Evans whose Title VII claims are still pending.[2] Until plaintiff Evans' claims are resolved the court cannot enter final judgment on this matter. See Fed. R. Civ. P. 54.[3]

D. The Pending Motion

The motion "for a new trial", or, in effect, for reconsideration of the July Order, was filed by plaintiffs Mills, Oliver, Lee, and Belcher-Bey on May 23, 2001. On June 8, 2001, plaintiff Williams filed his own motion "for a new trial," or, in effect, for reconsideration, incorporating the memorandum of points and authorities, and exhibits filed by plaintiffs Mills, Oliver, Lee, and Belcher—Bey. Both motions are based on plaintiffs' offer of "newly discovered evidence."

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[2] On July 14, 2000, defendants filed a motion to dismiss plaintiff Evans' claims on the ground that plaintiff Evans failed to list this lawsuit as an asset in a pending bankruptcy proceeding.

On July 24, 2000, plaintiff Evans filed an opposition to that motion, and on July 31, 2000, the motion was vacated due to the settlement of his bankruptcy proceeding, thereby mooting any jurisdictional concerns.

Since plaintiff Evans' opposition on July 24, 2000, the court has not heard from him or his counsel. In addition, plaintiff Evans' mail continues to be returned, marked "no forwarding address."

[3] The court may, however, enter judgment on the July 25 and November 17 Orders upon either party's motion under Rule 54(b), thereby making both, final orders. See Fed. R. Civ. P. 54(b).

II. Discussion

Although plaintiffs have titled their motion, a "Motion for a New Trial or Reconsideration," it cannot be considered as a motion for a new trial pursuant to Rule 59 because there never was a trial. See Fed. R. Civ. P. 59. Neither can this be a motion for relief from a final judgment or order pursuant to Rule 60 because neither the July 25 Order, nor the November 17 Order are final orders under Rule 54(b) See Fed. R. Civ. P. 54(b); see also Fed. R. Civ. P. 60. Therefore, the court considers this to be a motion for reconsideration of an interlocutory order and resolves it accordingly.

"District courts are authorized to reconsider, set aside or amend interlocutory orders at any time prior to final judgment." Vaughn v. The Regents of the University of California, 504 F.Supp. 1349, 1351 (E.D. Cal. 1981) (citing John Simmons Co. v. Grier Brothers Co., 258 U.S. 82 (1922)). "Motions to reconsider are committed to the discretion of the trial court. citation omitted) Nevertheless, the Court looks to the standards used in examining a Rule 60(b)motion." Nateo v. The M/S Kiso, 805 F.Supp 761, 786 (N.D. Cal. 1991) (citing Combs v. Nick Garin Trucking Co., 825 F.2d 437, 441 (D.C. Cir. 1987)).

Pursuant to the standards of a Rule 60(b) motion, a successful motion for reconsideration based on newly discovered evidence must show two things. First, the proffered evidence must actually be "newly discovered," which the moving party could not have discovered earlier with reasonable diligence. Coastal Transfer Co. v. Toyota Motor Sales, 833 F.2d 208, 211—12 (9th Cir. 1987) Second, "the newly discovered evidence must be

of such magnitude that production of it earlier would have been likely to change the disposition of the case." Seeat 211.

To prove discrimination in violation of Title VII, and survive defendants' motions for summary judgment, plaintiffs needed to establish a prima fade case, creating a presumptive inference of discrimination in violation of Title VII by the method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), or by offering more direct evidence of discriminatory intent. Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). To prove a prima facie case indirectly, each plaintiff needed to show (1) that he is a member of a protected class,[4] (2) that he applied and was qualified for the job or promotion, (3) that despite his qualifications he was rejected, and (4) that the position remained open and the employer continued to seek applications from persons of complainant's qualifications. See McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824.

If plaintiffs were able to establish a prima facie case on defendants' motion for summary judgment, the burden would then shift to defendants to articulate a legitimate, nondiscriminatory reason for their employment decision. Wallis, 26 F.3d at 889. Once defendants articulated a nondiscriminatory reason, plaintiffs would then be required to demonstrate that the

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[4] In this case, plaintiffs argue they are members of two protected classes: African-Americans and men. See Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994) ("where two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences" (citations omitted))

articulated reason was merely pretext for the defendants' true, discriminatory motive. Id; see also McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993).

Plaintiffs offer the following as "newly discovered" evidence in support of their motion and to establish their prima facie case of discrimination: (1) the December 29, 2000, report of the Joint Labor/Management Committee on Discrimination "JL/MCD report"); (2) the depositions of Jacquelyn Griffin, Darlene Moser, Caroline Beach, Cathy Cleek, Cathy Corona, Pamela Flowers, Lorraine Gomez, Dennis Hellman, Karen Jones, and Judy Johnson; and (3) the declaration of Laverne Young. (Pls.' Ex.s 15 2—13).[5]

A. The JL/MCD Report

The JL/MCD report is dated December 29, 2000, and it is "the product of the negotiated agreement between the State and California State Employees' Association (Civil Service Division) (Pls.~' Ex. 2 at p.1 of Introduction Letter) "The purpose of the JL/MCD is to 'review issues including the relationship of discrimination to adverse actions, departmental equal employment opportunity programs and current processes that deal with discrimination complaints.'" (Id.)

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[5] All of the proffered "newly discovered evidence" relates to plaintiffs' claims of general discrimination in the FTB's hiring and promotion practice. Plaintiffs do not offer any new evidence regarding their individual claims of retaliation, hostile work environment, or alleged violations of section 1983.

The report offers recommendations for improving the "negative trends" in the state civil service division's nondiscrimination polices. The recommendations are largely based on survey responses obtained by the Joint Labor and Management Committee on Discrimination ("the Committee") from thirteen different state agencies, including the FTB.[6] Plaintiffs contend that this report is evidence of discrimination against African-American males in the hiring and promotion practices of the FTB.

The information contained in the JL/MCD report is not "newly discovered evidence." The recommendations found in the JL/MCD report are based on the Committee's assessment of already available data, including a report from the State Personnel Board Adverse Action Task Force that was completed in 1994 ("the 1994 report"). (See Pls.' Ex.2 at p.8) In addition, the JL/MCD report is only "the latest study (the fifth in 12 years) where a panel of State civil servants has brought a comprehensive set of recommendations to deal with discrimination and in particular, the disproportionate impact of adverse employment actions upon certain state employee groups." (Pls.' Ex. 2 at p.1).

Thus, although plaintiffs may not have possessed the JL/MCD report itself prior to the July 25 and November 17 Orders, the information upon which the report bases its recommendations could have been discovered, with reasonable diligence, prior to the July 25 and November 17 Orders, and therefore it cannot be "newly discovered evidence." See Coastal Transfer Co., 833 F.2d at 212 (Evidence that "could have been discovered with reasonable

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[6] The Committee surveyed twenty-two state departments, but only thirteen responded.

diligence" is not newly discovered evidence.). Furthermore, even if the information were newly discovered, it is not of "sufficient magnitude to have been likely to change the disposition" of the motions. Coastal Transfer Co., 833 F.2d at 211.

In the Executive Summary of the JL/MCD report, the Committee acknowledges its finding, that the state program for preventing discrimination in the civil service arena is inadequate. The Committee's findings are based on the fact that many state departments lack effective policies for the prevention of discrimination.[7] The Committee also found that, state-wide, the "discrimination complaint data are inaccurate, incomplete and inconsistently reported ...." (See Pls.' Ex. 2 at p.1) The Committee does not link either of these findings to the FTB, or any other single state department.

The JL/MCD report also reflects a concern, based on the responses from thirteen state departments, that the state discrimination prevention program is not uniform. (See Pls.' Ex.2 at p.5) A finding that the entire state civil service division lacks uniformity in its discrimination prevention programs is not evidence that would establish a prima fade case of discrimination against African—American males in the FTB's hiring and promotion practices.

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[7] Plaintiffs assert that the JL/MCD report indicates that the FTB does not have procedures to handle complaints of discrimination. The report makes no such finding. The portion of the JL/MCD report to which plaintiffs refer actually reads:

"Of the 13 respondent departments, two do not have written procedures to handle informal discrimination procedures . California Public Employees' Retirement System (CalPERS) and the State Controller's Office." (Pls.' Ex. 2 at p.6)

The JL/MCD report also considers the disparate impact of adverse employment actions on African-American, Hispanic, disabled, and male state employees, based on the 1994 report. (See Pls.' Ex. 2 at p.8). The JL/MCD report lists the findings of the 1994 report, including the likely causes for the disproportionate impact of adverse employment actions upon these employee groups. (Id.) Nowhere does the 1994 report or the JL/MCD report specifically link the state-wide disproportionate impact of adverse employment actions on these employee groups to the FTB, or any other single state department. Neither does the report compare statistics of the eligible applicant pool to the number of African-American males hired by the state's civil service division.

Thus, while the JL/MCD report does reflect problems, state-wide, with uniformity in non-discrimination policies and a disproportionate impact of adverse employment actions on certain groups of state employees, it does not link any of these problems to the FTB, or the FTB's hiring and promotion practices. Consequently, the JL/MCD report does not establish plaintiffs' prima facie case of discrimination, and earlier production of it would not "have been likely to change the disposition of the [motions]." Coastal Transfer Co., 833 F.2d at 211. Because it satisfies neither of the requirements for newly discovered evidence, the JL/MCD report cannot be used to support plaintiffs' motion for reconsideration.

B. The Depositions

The depositions of Jacquelyn Griffin and Darlene Moser were taken in March of 1998. Thus, these depositions were in

plaintiffs' possession before this court's July 25 and the November 17 Orders were filed, and are not newly discovered evidence that plaintiffs can rely on to support this motion. See Coastal Transfer Co., 833 F.2d at 212 ("Evidence is not 'newly discovered' under the Federal Rules if it was in the moving party's possession at the time of [the hearing] ....").

The remaining depositions were taken after the July 25 and November 17 Orders were filed. However, each deposition was based on declarations that were signed by each deponent prior to July 25, 1999.[8] (See e.g. Flowers Depo. 8:19-25; Gomez Depo. 12:11—13:21). Thus, although the deposition testimony itself was not in plaintiffs' possession, any evidence obtained at these depositions "could have been discovered with reasonable diligence," prior to the July 25 and November 17 Orders.[9] Coastal Transfer Co., 833 F.2d at 212. Consequently, it is not newly discovered evidence and cannot support plaintiffs' motion for reconsideration. Id.

Even if the evidence obtained during these depositions were newly discovered evidence, it is not "of such magnitude" that timely production of it "would have been likely to change the disposition of the [motions]." Coastal Transfer Co., 833 F.2d at 211. Plaintiffs offer these depositions as evidence to

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[8] Plaintiffs' counsel had in fact already deposed Cathy Cleek prior to the July 25 Order. See Cleek Depo. 4:22-5:12).

[9] In reviewing the record the court notes that despite plaintiffs' knowledge of these witnesses and possession of their declarations, plaintiffs made no Rule 56(f) motion in response to defendants' motion for summary judgment. See Fed. R. Civ. P. 56(f). Plaintiffs cannot, two years later, seek to remedy their failure to conduct diligent discovery.

establish their prima facie case that the FTB' s processes for hiring and promotion discriminate against African-American males.

Plaintiffs point to portions of the proffered testimony where the deponents indicate that they hired or promoted employees within the FTB by confirming that a particular individual was "reachable" and then hiring or promoting them. (~ e.g. Flowers Depo. 9:23-11:10; Beach Depo. 12:15-24:25) Plaintiffs' claim is that this method of hiring and promotion, without advertising the positions or conducting interviews, is merely "pretext" for not hiring African-American males. What plaintiffs fail to point out, is that a number of the specific instances that these deponents testified about were "promotions in place" and not new positions. See e.g. Beach Depo. 12:15-16:22; Corona Depo. 23:3-24:20) As such, there was no need for the FTB to advertise the positions or interview for them. (See e.g., Beach Depo. 12:15—16:22; Corona Depo. 23:3-24:20)

Plaintiffs also cannot show how this method of hiring and promotion at the FTB has a disparate impact on African-American males because they still do not present statistics from which the court can compare the number of African—American males who were hired or promoted to the eligible applicant pool. See 42 U.S.C. § 2000e—2 (k) (1) (A) (i).[10] Instead, plaintiffs offer the

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[10] Plaintiffs offer the JL/MCD report as justification for their failure to provide relevant statistics. The report does indicate a state-wide problem with effective record-keeping regarding complaints of discrimination: "Discrimination complaint data are inaccurate, incomplete and inconsistently reported by state agencies." (Pls.' Ex. 2, JL/MCD report at p. 1). However, the court is puzzled as to how the lack of accurate "discrimination complaint" data from state agencies prevents plaintiffs from producing statistics comparing the number of African-American males hired or promoted within the FTB to the eligible applicant pool.

deposition testimony of Dennis Hellman as evidence that African-American men do not get hired or promoted at the FTB.

When questioned by plaintiffs' counsel, Mr. Hellman stated that in his twelve years as a supervisor at the FTB he could only specifically recall hiring one African-American male. (See Hellman Depo. 28:7-29:12) Without statistics regarding the eligible applicant pool, this testimony cannot support plaintiffs' claims of discrimination. Thus, the proffered depositions could not have effected the court's determination in the July 25 and November 17 Orders that these plaintiffs failed to establish a prima facie case of discrimination in the FTB's hiring and promotion policies. Because they fail to satisfy either of the requirements for newly discovered evidence, these depositions cannot be used by plaintiffs in support of their motion.

C. Laverne Young's Declaration

The declaration of Laverne Young is dated June 7, 1999, approximately one month before the July 25 Order was filed, thus it is not newly discovered evidence.[11] Coastal Transfer Co., 833 F.2d at 211. In fact, plaintiffs previously submitted the Young declaration as evidence in opposition to defendants' motion for summary judgment. This court already found Ms. Young's declaration to be inadequate to establish plaintiffs' prima fade case of discrimination, making it impossible for this piece of

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[11] The copy of Ms. Young's declaration that is attached to 28 plaintiffs' motion as Exhibit 13 is not even signed.

evidence to effect the court's decision in either the July 25 or November 17 Order.[12] (See id.)'

IT IS THEREFORE ORDERED that plaintiffs' motion for reconsideration be, and the same hereby is, DENIED.

DATED: July 6, 2001

/s/ William B. Shubb
UNITED STATES DISTRICT JUDGE

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[12] Plaintiffs include in their motion a section entitled "Specific Findings of the Court Requiring Reconsideration." Plaintiffs cannot move the court for reconsideration of its orders simply because they disagree with them. Such arguments are more properly presented to the court of appeals. A motion for reconsideration is not an opportunity for plaintiffs to reargue their opposition to defendants' motions for summary judgment. See Fed. R. Civ. P. 60(b); See e.g. Coastal Transfer - 833 F.3d 208

APPENDIX G

FILED

NOV 17 1999

CLERK, U.S. DISTRICT COURT

By _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORIA

MARCEL MILLS, JR., ANTHONY L. BREWER, SR., PAUL E. WILLIAMS, MICHAEL MELVIN, CARL E. LEE, JR., MAURICE E. BELCHER—BEY,VAN P. EVANS, JR., JAMES W. OLIVER, JR., individually,

Plaintiffs,

v.

FRANCHISE TAX BOARD, et al.,

Defendants.

No. CIV S-94-1801 WBS/JFM

MEMORANDUM AND ORDER

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Plaintiffs are current and former employees of the Franchise Tax Board ("FTB"), joined by an unsuccessful applicant for employment with the FTB. Each plaintiff alleges that the FTB violated Title VII of the Civil Rights Act of 1964 ("Title VII"), 24 42 U.S.C. § 2000e ~ seq.

The case is currently before the court on a Motion for Summary Judgment against plaintiff Paul Williams ("Williams"). 27 Fed. R. Civ. P. 56(c). In an Order dated July 26, 1999, the court granted summary judgment against plaintiffs Mills, Oliver,

Lee, and Belcher-Bey. The Court denied summary judgment against plaintiffs Evans and Brewer. Evans and Brewer's cases are set for separate trial.[1]

The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non—moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus, Co. v. Zenith Radio, 475 U.S. 574, 587 (1986)

I. facts

On July 31, 1992, Williams, an African American male, was appointed to a Tax Program Assistant ("TPA") position with the Franchise Tax Board ("FTB"). His appointment was probationary for six months so that he could learn the TPA workload. A probationer who cannot learn the workload is not hired at the end of the probation period.

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[1] Defendants' counsel indicates that they have settled with Michael Melvin.

Williams was assigned to the Evaluation and Resolution Unit ("E&R Unit"). This unit was responsible for categories of corporate taxpayers' accounts. Work is distributed among the TPAs by batches called updates. These updates contain 100-300 accounts. According to defendants, TPAs were expected to analyze two updates per week.

The new TPAs were trained by leads, technical support employees, and the TPA's supervisors. The E&R unit lead, Trisha Mendez, was assigned to Williams and provided him with one on one training for several weeks. She reviewed all the accounts he worked on and identified what additional training he needed.

After several weeks of training, Ms. Mendez became concerned because, defendants claim, Williams had trouble learning even the rudiments of the E&R workload. On September 10, 1992, Mendez met with Williams and the E&R supervisor, Patricia Rodriguez, to discuss Williams' progress as of the September 1, 1992 update. Rodriguez memorialized the meeting in a memo indicating areas for improvement and the percentage of errors. [2] Rodriguez Decl. Exh. 1.[3] Later that month, Ms. Rodriguez left the unit, and Michelle Bejarano joined the E&R

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[2] Defendants' Statement of Undisputed Facts states a range of 4% to 51% error. The court's interpretation of the statistics is an error range of 4% to 63%.

[3] Williams objects to the declarations of Mendez, Rodriguez, and Bejarano as so "word-for word identical that they are obviously more than the result of coaching, but in fact were totally created by attorney Kathryn Allen." All three declarants swear that their statements are based upon their personal knowledge, are true and correct, and are made under penalty of perjury. Williams cites no law to support his objection nor does Williams show any facts other than his own conclusory statements that Ms. Allen created the declarations. The declarations are admissible.

unit as a supervisor.

Bejarano continued to keep Williams apprised of his performance. Bejarano reviewed several of Williams' updates in September and prepared a report for Williams indicating his error rate and areas in which he needed to improve. The early reports contained input from Mendez and Rodriguez as well as Bejarano. Williams error rate ranged from 11.5% to 50% for the September 10th update and ranged from 1 to 14% for the September 15th and 17th updates. See Bejarano Decl. Exhs. 1, 2. His error rate for the September 17, 22, and 24, 1992 updates ranged from 1% to 29%. When he was asked to follow up to correct his errors, his error rate was 11.5%. Bejarano Decl. Exh. 4. His September 29, 1992 error rate ranged from 4%-20%. See Bejarano Decl. Exh. 5. At the end of September, Bejarano prepared a performance evaluation which indicated that his updates had numerous errors and that the acceptable error rate is 2%. She assigned him a score of "does not meet job expectations ("DNM") for quality of work. Bejarano Decl. Exh. 3.

Bejarano continued to review Williams' work, preparing numerous reports indicating error rates and pointing out specific areas in which to improve. In an interim report covering the period October 1, 1992 through November 10, 1992 and again in a scheduled performance evaluation covering October 1, 1992 through November 30, 1992, Bejarano gave Williams a DNM score in the area of quality of work and job knowledge. See Bejarano Decl. Exh. 6, 7. Mendez went on vacation in October, and Williams received another trainer, Tanya Criste.

In November 1992, Bejarano warned Williams that failure to improve his error rate could result in rejection. His interim report covering the month of December again indicated that he again did not meet job expectations with regard to quality of work or job knowledge. He received a score of "needs improvement" in productivity due to a backlog of work and in responsibility because his reworked error rate was 11%. See Bejarano Decl. Exh. 9. Bejarano again warned Williams that failure to improve would result in his rejection.

Although Williams does not dispute the actual numbers and percentages, Williams claims that his error rate was decreasing. He further claims that the high error rates were attributable to making mistakes on small numbers of accounts, thus "resulting in a high error percentage not representative of the relationship between quality and quantity of work performed." See Williams Undisputed Fact 5. Tanya Criste, Williams' subsequent trainer, disagreed that a few of the errors assigned to Williams were actually errors.

In January 1993, Bejarano met with Williams and her supervisor to discuss his work performance. Williams was backlogged by eight updates. See Bejarano Decl. Exh. 10. When they met with Williams two weeks later to discuss his progress, he had completed one portion of the update with an error rate of 36%. See Bejarano Decl. Exh. 11.

According to defendants, at the end of his six month probationary period, Williams never learned the E&R workloads. When he joined the TPA, the accepted error rate was 2%. When compared to peer and group performance however, the actual

accepted maximum error rate was 3 to 5%. See Bejarano Decl. ¶ 21. Williams was not performing at such a rate. FTB rejected him. A rejection is not a punitive action; rather, the probation period is considered the final step in an exam. Williams appealed the rejection to the California State Personnel Board. Following a full evidentiary hearing, the Board sustained the rejection. Williams sued.

II. Discussion

A. Standard

Williams claims he suffered disparate treatment at the hands of the FTB in violation of Title VII.[4] In the Complaint, Williams alleges that FTB disparaged him to potential employers who contacted the FTB for references. Williams does not address this claim in his Opposition. The court assumes it is abandoned. To prove discrimination in violation of Title VII, the plaintiff must establish a prima fade case, creating a presumptive inference of discrimination by the method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, (1973), or by offering more direct evidence of discriminatory intent. See Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). To prove a prima facie case indirectly, a plaintiff must show

[4] Williams does not attempt to prove the essential elements of a claim of disparate impact. 42 U.S.C. § 2000e—2(k) (1) (A) (i). For example, they do not present statistical evidence that compares the FTB's hiring and promotional practices to the eligible applicant pool. See Wards Cove Packing Co. v. Atonio, 490 *U.s.* 642, 650-51, 109 S.Ct. 2115, 28 2121 (1989)

(1) that he is a member of a protected class,[5] (2) that he applied and was qualified for the job or promotion, (3) that despite his qualifications he was rejected, and (4) that the position remained open and the employer continued to seek applications from persons of complainant's qualifications. See McDonnell Douglas, 411 U.S. at 802.

If plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. See Wallis, 26 F.3d at 889. Once defendant articulates a nondiscriminatory reason, plaintiff must demonstrate that the articulated reason is merely pretext for the defendant's true, discriminatory motive. See Id., see also McDonnell Douglas, 411 U.S. at 802; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993).

Plaintiff bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff on the basis of his race and/or gender. See Burdine, 450 U.S. at 253; St. Mary's Honor Center, 509 U.S. at 507. To prevail, plaintiff must provide specific evidence to prove defendant's articulated reason is merely pretext. Wallis, 26 F.3d at 890. Plaintiff may offer direct evidence of defendant's discriminatory motive or "specific and substantial"

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[5] In this case, Williams argues he is a member of two 25 protected classes: African—Americans and men. Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994) ("where 26 two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional 27 process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the 28 particular nature of their experiences" (citations omitted)).

circumstantial evidence that the articulated reason is pretext for discrimination. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998)

B. Williams' Claims

Even assuming that Williams can meet the prima facie case,[6] defendants have articulated legitimate, nondiscriminatory reasons for rejecting Williams after his probation period; Williams was not performing his job satisfactorily. Williams had very high error ratings during his probationary period. Although Williams claims that his rate was constantly improving, even in his last month of probation, his error rate was as high as 36% See Bejarano Decl., Exh. 11. Defendants point to Rodriguez and Bejarano's declarations that the acceptable error rate was 3% to

5%. See Bejarano Decl. ¶ 21, Rodriguez Decl. ¶ 18.

Defendants further claim that aside from his error rate, Williams continued to have performance difficulties. Defendant points to Trisha Mendez's declaration. She describes how FTB accounts are categorized according to the amount of taxes owed. These categories are called models and have different color tags attached to them. Williams had trouble consistently affixing the correct color tag to the matching model, resulting

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[6] Defendants claim that Williams does not meet the prima facie test because they have established evidence that he was "not performing his job satisfactorily." See Defendants' Motion for Summary Judgment 9:19-20. The court assumes that defendants are thus claiming that Williams was not qualified under the second and third prongs of the prima facie test. See McDonnell Douglas, 411 U.S. at 802. The prima facie test, however, is based on whether Williams can establish that he was qualified. Defendants' arguments are better used to meet their burden of showing that they fired Williams for a legitimate, nondiscriminatory reason. The court does not base its decision 28 on whether plaintiff has made out a prima facie case.

in accounts being assigned to tax representatives with inappropriate skill levels. See Mendez Decl. ¶ 17. Defendants describe numerous other instances of performance problems. According to Rodriguez, Williams frequently assigned the wrong code to accounts. See Rodriguez Decl. 1 6. He had trouble assigning accounts belonging to foreign corporations to the correct desk (the White Dragon desk). See Mendez Decl. 1 15. He was unable to distinguish taxpayers with different name, addresses, and corporate numbers form one another; consequently, he stapled different taxpayer's accounts together. See Rodriguez Decl. ¶ 14.

Defendants have established numerous instances where Williams failed to perform his work satisfactorily. Williams objects that the work was complex with no set criteria. He further claims that he had no manual to assist him and that his trainer had only trained one other before training him. These arguments are immaterial to defendant's burden. Defendant need only to articulate a legitimate nondiscriminatory reason for rejecting Williams. See Wallis, 26 F.3d at 889. Defendants have done so and thus have met their burden. Even if the court were to consider Williams' objections, the fact that work is complex and that there is no manual does not excuse unsatisfactory performance.

Once defendants have met their burden, Williams must show that defendants intentionally discriminated against him on the basis of his race or gender. See Burdine, 450 U.S. at 253. He is unable to do so. Williams has not shown any direct evidence of a discriminatory motive, nor does he even allege such

a claim. See Godwin, 150 F.3d at 1222. Furthermore, Williams fails in his attempts to show that defendants' claim of unsatisfactory work performance is merely pretext. SeeWallis, F3d at 890.

First, Williams claims that his second trainer, Tanya Criste, did not agree with all of the errors assigned to him. In support, he points to what look like several Xeroxed "sticky" notes affixed to a report. The notes contain remarks such as, "yes this should be deleted but it is not an error" and "give me a break! This should not be an error." The notes are signed T.L. Criste. See Williams Decl., Exh. A. Defendants object to admissibility.[7] Even assuming *arguendo* that the notes are admissible, they do not establish "substantial" evidence of pretext. See Godwin, 150 F.3d at 1222. At most, the notes indicate that Criste disagreed with five or six of Williams' errors. This level of disagreement is not substantial in the context of Williams' total number of errors. For example, the report reviewing the September 19th update indicated 113 errors. See Rodriguez Decl., Exh. 5.

Williams further claims that his error rate was decreasing and that his error rate was high only when he had errors in a small number of assigned cases. He points to a list of his statistics for the updates of November 3 through November 24, 1992 in addition to a report from September. See Williams Decl., Exhs. B, D. The November report shows a fluctuating rate

[7] Defendants object on the grounds that the notes are inadmissible as constituting hearsay and constituting an improper attempt to offer opinion testimony without proper foundation, authenticity or testimony, and are vague as to time.

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with the higher rates concentrated where there were fewer cases reviewed. The September report shows a high error rate. Defendants object to admissibility.[8] Even assuming *arguendo* that the exhibits are admissible, they do nothing more than show that Williams did have a substantial error rate. Although the rate may have lowered from September to November, Williams never reached and sustained the 3—5% rate defendants have established to be acceptable. The fact that in November the high rates were a result of errors on a small number of projects is immaterial. Williams continued to make errors. The reports are no evidence of pretext.

Finally, Williams claims that dismissing him on grounds of unsatisfactory work performance was mere pretext because management knew that plaintiff was not clear on what his work standards were. Williams points to an e-mail dated December 29, 1992. See Williams Decl. Exh. C. Defendants once again object to admissibility.[9] Again, even assuming *arguendo* that the e-mail were admissible, all it states is that "Paul was not aware the 2% rate was a guideline and that his production and quality performance is being compared to his peers." This fact, even if true, does not indicate that defendants rejected Williams on mere pretext. The fact that he may not have understood that there was a 2% error guideline does not change the fact that his error rate

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[8] Defendants object to Williams' statement that the error 25
rates were decreasing as speculation and conjecture in addition to being argumentative and lacking foundation. Defendants 26 further object to both exhibits as hearsay.

[9] Defendants object on the grounds that the exhibit constitutes hearsay and lacks proper foundation and authentication.

was often much higher than 2%, or even 3% to 5%, the acceptable rate indicated by Rodriguez and Bejarano.

Defendants have shown no "specific and substantial" circumstantial evidence that the articulated reason is pretext for discrimination. See Godwin, 150 F.3d at 1222. They have not met their burden.

C. Motions Filed Against Co-Plaintiffs

Williams asks the court to view this motion in light of the motions filed against co-plaintiffs. Williams claims that all the motions viewed together show a pattern of discrimination in the selection process at the FTB. In the course of ruling on the other motions the court examined them carefully. The court granted summary judgment against four of the plaintiffs (Mills, Oliver, Lee and Belcher-Bey). Two other plaintiffs are going to trial (Evans and Brewer). The facts surrounding their allegations are essentially unrelated to the facts surrounding Williams' claims, and do not support an inference that there was an obvious pattern of discrimination.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment against plaintiff Paul Williams be, and the same hereby is, GRANTED.

DATED: November 16, 1999

WILLIAM B. SHUBB
UNITED STATES
DISTRICT JUDGE

APPENDIX H

FILED

JUL 23 1999

CLERK, U.S. DISTRICT COURT

By _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORIA

MARCEL MILLS, JR., ANTHONY L. BREWER, SR., PAUL E. WILLIAMS, MICHAEL MELVIN, CARL E. LEE, JR., MAURICE E. BELCHER—BEY, VAN P. EVANS, JR., JAMES W. OLIVER, JR., individually, Plaintiffs, v. FRANCHISE TAX BOARD, et al., Defendants.	No. CIV S-94-1801 WBS/JFM MEMORANDUM AND ORDER

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Defendants bring six motions for summary judgment, or summary adjudication in the alternative, pursuant to Fed. R. Civ. P. 56, against six of the plaintiffs in this action, namely Marcell Mills, Jr., James Oliver, Carl Lee, Van Evans, Maurice Belcher-Bey, and Anthony Brewer, Sr.

Plaintiffs are current and former employees of the Franchise Tax Board ("FTB"), joined by an unsuccessful applicant for employment with the FTB. Each plaintiff alleges that the FTB violated Title VII of the Civil Rights Act of 1964 ("Title VII"),

42 U.S.C. § 2000e, et seq. In addition, Mills, Evans, and Brewer claim that various individual defendants are liable under 42 U.S.C. § 1983 for violations of their constitutional rights.

With regard to his Title VII claims, each plaintiff has opposed the respective motion for summary judgment. Only Brewer has opposed summary adjudication of his Section 1983 claim against Wayne Watanabe. Brewer concedes that summary judgment should be granted to Gerald Goldberg on the Section 1983 claim.

The court grants summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) The party adverse to a motion for summary judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) Such facts must be those as would be admissible in evidence. Fed. R. Civ. P. 56(e) Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)

Plaintiffs claim they suffered disparate treatment at

the hands of the FTB.[1] To prove discrimination in violation of Title VII, each plaintiff must establish a prima facie case, creating a presumptive inference of discrimination by the method established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), or by offering more direct evidence of discriminatory intent. Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). To prove a prima facie case indirectly, a plaintiff must show (1) that he is a member of a protected class,[2] (2) that he applied and was qualified for the job or promotion, (3) that despite his qualifications he was rejected, and (4) that the position remained open and the employer continued to seek applications from persons of complainant's qualifications. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824.

If plaintiff establishes a prima facie case, the burden shifts to defendant to articulate a legitimate, nondiscriminatory reason for its employment decision. Wallis, 26 F.3d at 889. Once defendant articulates a nondiscriminatory reason, plaintiff

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[1] Plaintiffs do not attempt to prove the essential elements of a claim of disparate impact, - that the defendant uses a particular employment practice that causes a disparate impact. 42 U.S.C. § 2000e-2(k) (1) (A) (i). For example, they do not present statistical evidence that compares the FTB's hiring and promotional practices to the eligible applicant pool. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650—51, 109 S.Ct. 2115, 2121, 104 L.Ed.2d 733 (1989).

[2] In this case, plaintiffs argue they are members of two protected classes: African-Americans and men. See Lam v. University of Hawaii, 40 F.3d 1551, 1562 (9th Cir. 1994) ("where two bases for discrimination exist, they cannot be neatly reduced to distinct components. Rather than aiding the decisional process, the attempt to bisect a person's identity at the intersection of race and gender often distorts or ignores the particular nature of their experiences" (citations omitted)).

must demonstrate that the articulated reason is merely pretext for the defendant's true, discriminatory motive. Id.; see also McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824; Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d 407 (1993).

Plaintiff bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against plaintiff on the basis of his race and/or gender. Burdine, 450 U.S. at 253, 101 S.Ct. at 1093; St. Mary's Honor Center, 509 U.S. at 507, 113 S.Ct. at 2747. To prevail, plaintiff must provide specific evidence to prove defendant's articulated reason is merely pretext. Wallis, 26 F.3d at 890. Plaintiff may offer direct evidence of defendant's discriminatory motive or "specific and substantial" circumstantial evidence that the articulated reason is pretext for discrimination. Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998)

The same burden-shifting analysis applies to plaintiffs' claims of retaliation in violation of Title VII. See Wallis, 26 F.3d at 889. A plaintiff may create a presumptive inference of unlawful retaliation by demonstrating that he engaged in a protected activity, that his employer thereafter subjected him to adverse employment action, and that a causal link exists between the protected activity and the employer's action. Nidds v. Schindler Elevator Corp., 113 F.3d 912, 919 (9th Cir. 1996); Wallis, 26 F.3d at 891. If plaintiff makes a prima facie case, the defendant bears the burden of articulating

a legitimate, nonretaliatory reason for its business decision. Wallis, 26 F.3d at 889. It then falls to the plaintiff to demonstrate that the defendant's proffered reason is merely pretext for impermissible retaliation. Id. at 890.

Several of the plaintiffs claim the FTB has maintained a hostile working environment. To establish a hostile working environment claim, the plaintiff must show that he was subjected to unwelcome harassment, based on his membership in the protected class, that affected a term or condition of employment. Fuller v. Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) The plaintiff must further establish that once the employer was actually or constructively apprised of conduct, it failed to take adequate remedial and disciplinary action. Id. A term or condition of employment has been affected when the harm has been sufficiently severe or pervasive to create an abusive working environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). The court looks at all the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23, 114 S.Ct. at 371. Not only must the plaintiff subjectively perceive the environment as abusive, a reasonable person with the same fundamental characteristics as plaintiff must also view it as abusive. j~ at 21—22, 114 S.Ct. at 370. While the same legal standard for establishing a violation of Title VII applies to each plaintiff, the facts of

each plaintiff's case require individual application.

I. Mills

Mills claims that (a) the FTB discriminated against him on the basis of his race and gender by failing to promote him and by terminating his employment; (b) the FTB maintained a hostile environment, failed to promote him, and terminated his employment in retaliation for filing his Title VII lawsuit; (c) defendant Marendt caused his arrest and search without probable or reasonable cause in violation of his Fourth Amendment Rights; (d) defendants Goldberg, Porto, and Marendt terminated his government employment without due process of law; and (e) defendants Goldberg, Porto, and Marendt deprived him of his rights to speech and privacy protected by the First and Fourth Amendments.

Factual Background

Mills, an African-American male, began working for the FTB in 1987. Starting in 1989, he was promoted to the position of Office Services Supervisor I ("OSS I") In June, 1991, Mills took medical leave due to workplace stress, possibly caused or worsened by his belief that the FTB discriminated against black men in hiring and promotions. He returned to his position as an OSS I in the Bank and Corporation ("B & C") Section in September, 1993. In March, 1995, he was promoted to the level of OSS II on a limited-term basis so that he could supervise a group of part25 time student clerks. During this time, his first-line supervisor was Diane Nix. Aleece Marendt, Nix' supervisor, was Mills' second-line supervisor. The limited-term OSS II position ended on June 30, 1995, and Mills returned to his previous position as

an OSS I.

At the time that the OSS II position was coming to an end, there was some dispute about whether Mills would return as an OSS I, or whether he would be moved to a non-supervisory position as part of a departmental plan to cut down on "middle- management." Ultimately, it was determined that Mills had to be returned to his former supervisory position, because he did not volunteer for the lower rank.

On July 13, 1995, Nix and Mills got into a confrontation. Nix was speaking angrily to Mills, standing so close to him that he commented that she was spitting on him. Nix started to walk past Mills. On her way by him, she struck him with her shoulder. Mills fell into a desk and credenza and dropped his briefcase. Both Mills and Nix filed complaints against each other.

Marendt conducted an investigation of the incident. She interviewed each of the witnesses whom Mills and Nix had identified. As part of Marendt's investigation of the incident, several of the managers she supervised expressed they felt threatened by Mills. For example, one supervisor felt the need to be escorted by a co-worker to the parking lot at night, because she feared a confrontation with Mills. Another supervisor reported a conversation with Mills in which Mills said he needed prescription drugs to control his anxiety. The conversation then turned to discuss a recent event in which an

employee had shot his managers.[3] Marendt's investigation also uncovered that Mills had made some statements to co-workers that could be construed as hostile to women in the workplace.

As the result of her investigation, Marendt determined that she should terminate Mills' employment. Mills was placed on administrative leave on August 1, 1995, and was served with a Notice of Adverse Action for termination of his employment in September. Prior to the effective termination date, Mills had a Skelly (due process) hearing and the Skelly officer upheld the dismissal. Mills appealed the dismissal to the State Personnel Board, but voluntarily withdrew his appeal after 6 days of evidentiary hearings.

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[3] Although Mills' deposition testimony regarding this conversation demonstrates that his comments are capable of a non-violent interpretation, what is relevant is what was reported to Marendt in her investigation. See Vargas v. Gromko, 977 F. Supp. 996, 1002—1003 (N.D. Cal. 1997) . Jim Patterson reported to Marendt that:

[h]e than [sic] went into telling me how he was on the edge and was taking anxiety medication and that he did not know what would happen if he did not take this medication. The than [sic] made reference to the guy in L.A. that killed his three administrators. He said even though he felt he could lose it at anytime that he didn't have it in him to do that. I said you are not telling me that you are going to come in here and do that and he replied that if he did I would not know it until I heard the bullets flying. He than [sic] said I reiterate that I am not the type of person that would do that because I would not be able to live with myself if I did but that he is that close to going over the edge an [sic] was just using that as an example." (Mills Decl., Exh. AM6.)

The Title VII Claims

Mills claims that the FTB failed to promote him[4] and discharged him for discriminatory and/or retaliatory reasons. Defendant does not contest whether Mills can establish a prima facie case.

Defendant offers a legitimate, nondiscriminatory and nonretaliatory reason for terminating Mills' employment: the FTB determined that he presented a threat to the safety of its employees, particularly to people in the supervisory levels. The burden shifts back to Mills to present evidence that could show that this reason is merely pretext for defendant's true, discriminatory or retaliatory reason.

Mills presents data consisting of a breakdown of the race and gender of FTB employees in different job categories. He argues these data demonstrate the FTB's pattern of discriminatory hiring and promotion practices, which proves defendant's reasons are pretext. See Warren v. City of Carlsbad, 58 F.3d 439, 443 (9th Cir. 1995). Unfortunately for Mills (and for the other plaintiffs who make this same argument), the data are inconclusive. They do not contain a comparison of the numbers of black men hired and promoted with the numbers in the relevant eligible applicant pools, or in the general population in the labor market.

Mills claims the FTB has failed to comply with its

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[4] Neither defendant nor Mills discusses Mills' failure to 26 promote claim in the moving papers on this motion. There is no contention that plaintiff applied for, or was otherwise eligible 27 for, a specific position that he did not receive. Thus, he does not meet his burden in establishing his prima fade case with 28 respect to the failure to promote claim.

Affirmative Action Plan, which would be relevant in proving defendant's reason is pretext for discrimination. However, his conclusory statement that the FTB has not complied with the Affirmative Action Plan is not evidence thereof. Although the copy of the Affirmative Action Policy Mills submits states that "[t]he implementation of specific affirmative actions are accomplished through goals and timetables," he has not set forth any evidence of what such goals and timetables might be. Neither has he explained how the data he provides the court relate to any goals and timetables of the Affirmative Action Plan.[5]

Mills attempts to demonstrate defendant's reason is pretext by describing the tense racial environment he experienced before and during his medical leave in 1991 through 1993. Even if any of this behavior was discriminatory or retaliatory, Mills has not presented any evidence connecting it to Marendt's actions in 1995. See DeHorney v. Bank of America Nat. Trust & Say. Ass'n, 879 F.2d 459, 4 67—68 (9th Cir. 1989) It is therefore insufficient to demonstrate defendant's reason is pretext.

To prove defendant's reason is pretext, Mills also presents testimony from a co-worker to demonstrate that he was not a threat and that she did not perceive that any of the supervisors were threatened by Mills. At most, Mills thereby shows that some employees were not threatened; it does not demonstrate that none were. In fact, the evidence is to the contrary. Mills has no evidence to rebut the contention that some supervisors believed he was a threat and no evidence to

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[5] This argument is likewise unpersuasive when presented 28 by the other plaintiffs in this action.

prove that Marendt had any reason to disbelieve these supervisors when they expressed their fear of Mills. Also, the fact that most of the supervisors who reported feeling threatened by Mills are women is not substantial evidence that he was discriminated against on the basis of his gender. After the comment about the workplace shooting, a male, Jim Patterson, reported he felt threatened by Mills as well. Neither is the fact that Mills was placed on administrative leave the same day as he planned to file a discrimination complaint substantial evidence from which an inference of retaliatory motive can rationally be drawn, when it is undisputed the FTB placed him on administrative leave within days of Patterson's report of Mills' comments about the workplace shooting.

Mills comes closest to presenting evidence from which a rational trier of fact could infer defendant's retaliatory animus when he argues that Marendt had said that she was not threatened by him, but by the issues he raises. Mills' support for this contention, however, is not admissible to prove that Marendt said this. While Mills' declaration may be sufficient to attest to the fact that he sent Marendt the e-mail in question, it does not vouch for the veracity of the contents of the e-mail. To raise a genuine issue for trial, Mills must submit admissible evidence. Fed. R. Civ. P. 56(e).

Summary judgment of Mills' Title VII claims is appropriate.

The Section 1983 Claims

Mills does not present an opposition to summary judgment on the Section 1983 claims. Summary judgment of these

claims is appropriate.

II. Oliver

Oliver claims that (a) the FTB discriminated against him on the basis of his race and gender by failing to promote him; and (b) the FTB maintained a hostile environment and failed to promote him in retaliation for filing his Title VII lawsuit.

Factual Background

Oliver, an African-American male, has worked for the FTB since 1987. He has held the positions of Tax Program Assistant and Program Technician III ("PT III") He currently holds the position of Tax Technician. In October, 1994, Oliver was interested in the position of Coordinator of the FTB's School Partnership Program. He had interviewed for the position in 1993 and, although he was not selected for the job, Pam Langbehn told him it had been a tough choice and she encouraged him to reapply the next time the position was open. When the position became open again in the fall of 1994, Oliver was not interviewed or selected for the position. The position was filled by a Hispanic male. Oliver applied for the position again in June, 1997, and again was not interviewed or selected.

In August, 1994, Oliver took a voluntary demotion from PT III to Tax Technician so that he could work in the Filing Enforcement Unit ("FEU"). He took the examination for the position of Tax Compliance Representative, so that he could apply for any promotional positions that opened up. Cathy Cleek was the manager of the FEU. Oliver expressed interest to her in being promoted to the Tax Compliance Representative position in

the FEU. In February, 1995, two positions for Tax Compliance Representative in the FEU were announced as open for lateral transfers, i.e., open for those who were already Tax Compliance Representatives. After Oliver submitted his application, the supervisor declined to interview applicants and selected Mark Roth, a white male, for the position. The other position did not become available, because the employee who formerly held the position decided not to leave.

In January, 1995, two positions at the PT III level were advertised as available in the B & C Section. Oliver did not apply for them, and the positions were filled with two women. Within a few weeks, it was determined that the duties for these positions were more accurately reflected by the rank of Staff Service Analyst ("SSA") The positions were reclassified as SSA positions.

In 1994, Oliver and three other black men met with the Employee Assistance Program ("EAP") Coordinator to discuss the creation of a black employees' advisory committee. At the time, there was at the FTB a Women's Advisory Committee and various associations related to group membership (~.g., Hispanic, Filipino, Asian—Pacific heritage, disabled, and gay) Oliver claims that the FTB opposed formation of a black employees' advisory committee on the grounds that it would be too divisive. Instead, Oliver took steps to reorganize the various employee groups into a general Employees' Advisory Committee.

In February, 1995, Oliver spoke with Jackie Griffin, the Equal Opportunity Officer, and mentioned that he was thinking of applying for the Women's Advisory Committee. At this time,

Griffin had knowledge of the filing of the Title VII lawsuit. Oliver claims that Griffin discouraged him from applying for the committee, saying he would only start trouble. However, the January 31 application date for the position had already passed by the time this conversation took place.

Oliver's efforts to create a unified Employees' Advisory Committee came to fruition in June, 1995. Oliver received a certificate of recognition for his efforts in bringing about the change. Early in 1997, Oliver applied for a position on the Employees' Advisory Committee, but was not selected for the position. Oliver does not provide any information about the requirements for the position or the qualifications of those who received the position.

The Title VII Claims

Oliver claims the FTB discriminated and retaliated against him by denying him positions or promotions in four different departments: (1) the School Partnership Program; (2) the Tax Compliance Representative position in the FEU; (3) the SSA positions in the B & C Section; and (4) positions on the Women's Advisory Committee and later the Employees' Advisory Committee. Oliver also claims the FTB retaliated for his participation in the Title VII lawsuit and complaints of discrimination by creating a hostile working environment.

1. The School Partnership Program

Defendant does not contest Oliver's ability to establish a prima facie case regarding the 1994 position. It offers as a legitimate, nondiscriminatory reason for not hiring Oliver the explanation that he did not have the level of

experience the FTB was seeking. Oliver attempts to show this reason is pretext by pointing out that he had been a strong candidate for the position in 1993 and that he had been asked to reapply. This does not suffice to demonstrate pretext when defendant has explained that the position requirements had changed to reflect the increased responsibility of the job.

Oliver questions the credibility of defendant's proffered reason by pointing out that the application procedure was not followed and the new criteria for the position were not posted prior to selection of the successful applicant. However, suggesting that a defendant's articulated reason is not believable is not sufficient; plaintiff must also be able to show that defendant's true reason is discriminatory or retaliatory. See St. Mary's Honor Center, 509 U.S. at 514—15, 113 S.Ct. at 2751. Oliver presents no evidence that suggests defendant's hiring decision was based on racial and/or gender bias or in retaliation for making complaints about discrimination at the FTB. Indeed, Langbehn considered three African—American men for the position. Oliver cannot establish that he was eligible for the position when it became available again in 1996. To reflect the increased responsibility of the position, it had been made a Tax Service Specialist position. Oliver is unable to show he was eligible for promotion to this rank.[6]

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[6] His unsupported assertion that the FTB raised the rank of this position so that it would not appear to be discrimination when he was not selected does not support an inference of discriminatory or retaliatory animus.

2. Tax Compliance Representative Position in the FEU

Oliver contends that in March 1995, after posting a job notice but without holding interviews, Cleek filled a position for Tax Compliance Representative by hiring Roth, a white male. Defendant argues that Oliver cannot establish a prima facie case of discrimination or retaliation because he was not qualified for the position for two reasons: (1) the position was for lateral transfers only and it would have constituted a promotion for Oliver; and (2) even if the position had been open for promotional applicants, Oliver had not ranked high enough on the certification list to be selected for the position.

Oliver takes issue with the FTB's explanation that the position was for lateral transfers only. He disagrees with Cleek's rationale for seeking applicants who had already gone through "boot camp" training as Tax Compliance Representatives. He notes that some Tax Technicians and an Office Technician had attended the "boot camp" although they were not Tax Compliance Representatives. However, Oliver's criticism that lower-level staff had attended the "boot camp" does not detract from the usefulness of the training to Tax Compliance Representatives.[7] Oliver's disapproval of the rationale behind the requirement for the position that the applicant already be a Tax Compliance Representative does not alter the fact that he cannot show he was

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[7] Oliver may be claiming that the FTB discriminated against him by not providing him with this training, which it had provided to four female employees who were not Tax Compliance 26 Representatives. Such a claim would fail, however, because Oliver has not presented evidence to demonstrate that he and the 27 women were similarly situated. For example, he has not offered evidence that the women had not been waiting longer than he had to receive the training opportunity.

qualified for the position and thus cannot establish a prima facie case with respect to this position.

Oliver seeks to raise a triable issue of fact as to whether he was actually in a "reachable" rank on the certification list.[8] He submits as evidence the unofficial information list, which indicates he was in Rank 3. The list he submits, however, clearly states on each page that it is unofficial and selections are not to be made on the basis of it. The FTB has submitted evidence to demonstrate that the information list was subsequently re-ranked, pursuant to a change in state law on the use of veterans' preference points, before becoming the official certification list. After the re-ranking, Oliver was no longer in a "reachable" rank and was thus not qualified for the position.

With respect to Oliver's retaliation claim, defendant points out an additional reason that Oliver cannot establish a prima facie case. Oliver presents no evidence to demonstrate that the managers who made the hiring decision, Cleek and Marlene White, knew that Oliver had filed a Title VII lawsuit or made any other complaints of discrimination against the FTB. Yartzoff v. Thomas, 809 F.2d 1371, 1374 (9th Cir. 1982) (employer's decision made before learning of plaintiff's protected activity does not raise an inference of causation). Oliver contends that

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[8] Under the civil service "rule of three ranks," the employer can only select applicants from the top three ranks in which there are any applicants remaining. These are referred to as the "reachable" ranks. "Certification list" is what the FTB terms the official list of applicants for a position; the FTB does not select applicants from the "eligible list" or "information list."

in March, 1995 Cleek must have known of his participation in protected activity because Griffin knew of his Title VII complaint as early as February, 1995. Oliver presents no evidence, however, that Griffin or any other person told Cleek or White about Oliver's protected activity. Because he cannot show that the decision-makers knew of the protected activity, he cannot establish the inference of causation necessary to pursue the retaliation claim with respect to the FEU position that was filled in March, 1995.

3. SSA Positions in the B & C Section

In the B & C Section, Marendt advertised throughout the FTB two positions at the PT III level. Julie Fowler and Lori Tataipu were selected and began working in the B & C section. Later, Marendt reclassified the positions to the SSA classification. Oliver claims that he was denied the opportunity to compete for this promotion.

Oliver has not presented a prima facie case of discrimination or retaliation with respect to either of these positions because the undisputed evidence establishes that he did not apply for them although he had the opportunity. The reclassification of the positions from the PT III level to the equivalent SSA level does not alter the fact that Oliver could have competed with Fowler and Tataipu for the position but declined the opportunity.

4. The Advisory Committee Positions

Oliver did not apply for the 1995 position on the Women's Advisory Committee. Instead, he claims Griffin's comment that he should not apply because he would only cause trouble

dissuaded him from applying. He contends that Griffin's comment was based on her discriminatory and/or retaliatory animus against him. Griffin's alleged comment, even if made, has no causal connection to Oliver's failure to apply for the position, however, because the application deadline was January 31, 1995 and Oliver contends she made the comment in early February, 1995, after she had learned of the Title VII lawsuit.

In 1997, Oliver was not offered a position on the Employees' Advisory Committee. Oliver claims this was because Griffin was on the interview panel and she knew of the complaints that Oliver had filed. However, Oliver is unable to develop a prima facie case with respect to the 1997 position; he has not offered evidence showing that he met the qualifications for the position or that the person(s) who received the position had the same or lesser qualifications than he had. The mere fact that Griffin was on the panel does not raise an inference of retaliatory animus.

5. Hostile Work Environment

Oliver claims that he was subjected to a hostile work environment because of the filing of the Title VII action and his association with his co-plaintiffs.[9] First, he claims that he

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[9] In 1994, FTB management opposed the creation of a black employees' advisory committee, allegedly because it would be "too divisive." This situation does not contribute to Oliver's retaliatory hostile work environment claim, because this situation occurred prior to Oliver's protected activity. Oliver's complaint that a supervisor used slang with him but not with any other employees meets the same fate.

Another set of facts claimed by Oliver also falls outside the scope of the hostile work environment claim. Oliver complains of a search performed by the security at a State Personnel Board hearing for Mills. Oliver has failed to explain how this action constitutes action taken by the FTB.

was threatened by a FTB manager with a gun, steel bar, and scissors, and that the FTB did not respond properly to his complaint regarding this alleged threat. He has no support, however, for his contention that Maria Porto directly threatened him. Instead, the reference to the gun, steel bar, and scissors are taken out of context from Porto's statement to Marendt regarding her fear that Mills might attack her at work or someone might invade her home. It is a far stretch to say that Oliver was threatened by Porto.

Second, Oliver contends that his manager retaliated against him when he threatened to place a written warning in Oliver's personnel file for misuse of the e-mail system. Oliver had posted on the FTB e-mail system a forwarded message from Mills in December, 1995. Oliver was informed that the FTB was being strict with him in this case because the matter involved Mills. He claims this constitutes retaliation, because Mills is a co-plaintiff in the lawsuit. The e-mail message, however, did not concern the protected activity. To the extent that the FTB was more strict with Oliver about the e-mail from Mills than it is, for example, about jokes broadcast through the e-mail system, the FTB was justified, considering the circumstances surrounding Mills' discharge. A number of staff had indicated fear of Mills and it would be disruptive to the workplace to renew that fear by broadcasting messages from him over the e-mail system. Because Oliver was reprimanded for his personal activities rather than for his protected activities, the FTB's response does not

contribute to a finding of a retaliatory hostile work environment.

Third, Oliver refers to a conversation with a manager in which it was related to him that the FTB would be treating him differently because of his having filed the Title VII lawsuit. The statement by Steve Sims that upper-level managers remarked that Oliver would have to be treated with kid gloves because of the lawsuit is inadmissible hearsay that cannot support Oliver's hostile work environment claim.

This leaves only the comment by Griffin that Oliver would cause trouble if he were placed on the Women's Advisory Committee. This single remark is insufficient to create an environment that a reasonable person would view as abusive. A single, stray remark is insufficient to establish discrimination or retaliation. See Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438—39 (9th Cir. 1990)

From a reading of the pleadings in this case, one gets the impression that the working environment at the FTB is marked by unfriendliness and antagonism toward everyone, regardless of their race, color, religion, sex, national origin, age, disability, or anything else. While such a condition might give them cause to consider employment elsewhere, the law has not yet reached the point where it gives them a cause of action under Title VII.

III. Lee

Lee claims that the FTB discriminated against him on the basis of his race, gender, and the fact that he married a white woman by maintaining a hostile environment and by failing

to promote him.

Factual Background

Lee is an African—American male. In January, 1990, he was promoted to the position of Tax Auditor and was on probationary status for one year. The first 12 weeks consisted of a training class.[10] The Training Coordinator observed that he completed less than half of the reading assignments and was disruptive to the class by leaving early. In his first probation report, his performance was rated "does not meet job expectations" in one area. In his second, third, and fourth probation reports, his performance was rated "does not meet job expectations" in four areas. Lee was then demoted to his previous position as Tax Technician.

Lee had no further performance problems until July 1993, when he suffered a back injury at work. After the injury, the State Compensation Insurance Fund investigated the claim. The investigator contacted Lee's supervisor at the time, Denise Springer, who gave him the names of the employees who may have witnessed the injury.

After his injury, Lee was absent from work frequently: 35 hours in July, 1993, 43 hours in August, 55 hours in September, 56 hours in October, 73 hours in November, 66 hours in December, 47 hours in January, 1994, 53 hours in February, 52 hours in March 47 hours in April, 75 hours in May, and 110 hours in June. When Ruth Moore took over as Lee's supervisor in July, 1994, she reviewed the inventory of cases assigned to Lee and

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[10] During this time, he announced to his co-workers his marriage to a white woman.

found that he had fallen behind in his performance. Lee disputes this, but has no evidence to show that his performance was satisfactory. In January 6, 1995, Moore wrote a negative review of Lee's workload problems and gave him two negative performance evaluations in March and October of 1995. His improved performance was reflected in his March, 1996 performance evaluation.

Moore was also concerned about how often Lee took leave. Beginning in mid—1994, she required that Lee bring authorization from his doctor when the leave was related to his back injury. She also required that he provide 24-hour notice of use of vacation leave, because he was using it so frequently.

Lee's claim that Moore required him to tell her the substance of his meetings with his "legal counsel" before he would be allowed to take leave is actually about his meetings with the union representative.[11] After a discussion with Moore's supervisors, it was decided that Moore would no longer ask staff the subject of the meetings with the union representative.

In 1996, Lee applied for a promotional position as Staff Information Systems Analyst (Specialist) Lee does not present information on who was selected for the position and does not state if he was qualified for promotion to that position.

The Title VII Claim

Even assuming that Lee could establish a prima facie case, defendant has shown legitimate, nondiscriminatory reasons for its conduct vis—a-vis Lee. The FTB demoted Lee from the Tax

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[11] Lee's opposition does not counter this contention made 28 by defendant and he cites to no evidence to explain otherwise.

Auditor position because his poor performance demonstrated that he was incapable of performing the job. Lee's argument that his performance had been satisfactorily corrected is not supported by the declarations to which he cites. Lee has not presented any evidence that could show that defendant's reasons are pretext for discrimination on the basis of race, gender, or his association with persons of another race.

Lee's claim that he was evaluated according to a "more critical standard" after the filing of the Title VII lawsuit relies solely on the temporal relationship between the negative evaluations and the filing of the suit in the later part of 1994. Lee does nothing, however, to rebut the defendant's legitimate, nondiscriminatory reason for the negative evaluations, . that he was not completing nearly as many cases as he should and that much of his caseload was not entered correctly as inventory on the Local Access Network. His unsupported belief that Moore was mistaken about the number of cases he had not completed is not sufficient to raise a triable issue that defendant's proffered reason is pretext.

As to the investigation surrounding his claim for workers' compensation, Lee claims that Springer encouraged FTB employees to testify falsely against him. Lee has no admissible evidence that this occurred. The fact that those who were interviewed were later promoted does not raise a triable issue as to whether Springer told them what to say. Lee is unable to establish a prima facie case with regard to this claim. Lee has not offered evidence to demonstrate that the FTB imposed the requirements for sick leave documentation and 24-

hour notice because of discriminatory or retaliatory reasons. Defendant's legitimate, nondiscriminatory reason is that it needed to document what leave was compensable by the workers' compensation claim, and it needed to have advance notice of his vacation leave to better adjust the workload, given that Lee was absent so frequently. Despite Lee's argument to the contrary, the requirement of the doctor's note does not appear to be in violation of the FTB's sick leave policy, given that such a requirement is allowed when a worker uses sick leave excessively. Although there is some dispute as to whether the compensable leave could be tracked without requiring a doctor's note, Lee has not presented evidence that the true motivation behind the requirement was discriminatory or retaliatory animus.

Although the parties dispute whether Moore had violated FTB policy by requiring Lee to tell her what he was going to discuss with the union representative, there is nevertheless no evidence that Moore imposed this requirement because of Lee's race, gender, affiliations, or participation in the lawsuit. Lee provides no information as to whether non-black or female employees were required to tell Moore the substance of their talks with the union representative.

Finally, with regard to the position for which Lee applied in 1996, he has not established that he was qualified for the position. Defendant offers evidence that the personnel rules do not allow an employee to transfer to a position with a salary more than 10% higher than his previous position. The Staff Information Systems Analyst (Specialist) position had a salary range much more than 10% higher than the salary range of Lee's

position as a Tax Auditor.

Lee also has not established that he was subjected to hostile acts sufficiently severe or pervasive such that a reasonable person would view the working environment as abusive. His Title VII claim fails.

IV. Belcher—Bey

Belcher-Bey claims that the FTB discriminated against him on the basis of his race and gender by failing to hire him.

Factual Background

Belcher-Bey, an African-American male and veteran, competed in the 1994 examination to become a Tax Program Assistant.[12] He earned a 90% score on the exam, which placed him in Rank 4[13] During the one—year period that applicants could be hired from the 1994 certification list, 153 applicants were hired, including 70 who placed in Rank 4. Of those 70 Rank 4 applicants, 48 had already been non-civil service FTB employees,

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[12] The examination consisted of a structured written exercise and an in-person interview. The score that the interview panelists gave an applicant (plus any veterans preference points) determined the rank in which an applicant was placed on the certification list.

[13] Belcher—Bey points out that his status as a veteran would have put him in Rank 2, had the paperwork documenting his status been correctly submitted. He states that he did inform the FTB interview panelists that he was a veteran. As a result, it gave him an application for veterans preference points to submit to the State Personnel Board. Although he has submitted evidence that he formally established his veteran status with the State Personnel Board in July or August of 1994 (and received written confirmation thereof on November, 25, 1996), he presents no evidence to demonstrate that the FTB was notified of the points. He claims the State Personnel Board indicated that it would automatically update his score with the FTB. However, he offers no evidence that it did so. Neither has he presented evidence showing that he forwarded to the FTB a copy of the State Personnel Board's letter evidencing his eligibility for veterans preference points.

such as seasonal clerks, student assistants, and youth aides, and three were civil service FTB employees seeking to change career paths. The remaining 19 Rank 4 appointees included one black man. The FTB did not, however, hire Belcher-Bey.

The Title VII Claim

Belcher-Bey can establish the elements of the prima facie case as set forth in McDonnell Douglas: his membership in the protected class, that he applied for the job and was qualified at the Rank 4 level, that he did not receive a full— 10 time job at the FTB,[14] and that the FTB hired 69 applicants from the Rank 4 level who are not black men.[15] These factors notwithstanding, defendant contends that Belcher-Bey cannot raise an inference of intentional discrimination when the hiring decision-makers did not have knowledge of Belcher-Bey's race. See Robinson v. Adams, 847 F.2d 1315, 1316 (9th Cir. 1987) . The McDonnell Douglas elements do not rationally create an inference of intentional discrimination when there is no evidence that the decision-maker knew the plaintiff's race. Robinson, 847 F.2d at 1316.

Although the interview panelists could determine visually the race and gender of applicants, Belcher-Bey has

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[14] The fact that he declined a position with the Employment Development Department does not detract from his ability to demonstrate a prima facie case because Belcher-Bey has 24 raised a triable issue as to whether the part—time position he turned down was comparable to the full-time FTB position he 25 sought.

[15] The fact that the FTB hired a black man from Rank 4 of the 1994 certification list does not eliminate the fact that Belcher-Bey can show that individuals outside the protected class were hired for the other positions. See Howard v. Roadway 28 Express, Inc., 726 F.2d 1529, 1536 (11th Cir. 1984).

presented no evidence that this knowledge of the applicants' race was communicated to the decision-makers who selected applicants from the 1994 certification list. The certification list, upon which the hiring decision-makers relied, did not contain information on applicants' race. None of the FTB supervisors who sat on interview panels for the 1994 certification list were decision—makers who selected applicants for hire. Moreover, given that over two thousand applicants were interviewed,[16] it is unlikely that anyone could remember the race of individual applicants.

Belcher-Bey nevertheless contends that discrimination occurring at the interview stage "infected" the FTB's later selection of applicants.[17] See Lam, 40 F.3d at 1560. He submits evidence that some FTB employees and supervisors approached interview panelists and sought preferential scoring for their friends, former co-workers and family members. However, he presents no evidence that suggests such recommendations were targeted to disadvantage black males. Minor irregularities in the hiring process, or even outright nepotism, do not without more constitute a showing of discriminatory animus. ~ Wallace

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[16] The FTB conducted in-person interviews of 2,140 applicants for the Tax Program Analyst position. Eight panels conducted an average of 18 interviews per day for a period of two weeks.

[17] Analysis of whether the FTB discriminated against Belcher—Bey in giving him a score of 90% in the in-person interview does not lend itself well to the McDonnell Douglas approach. This is because there is no way to establish whether Belcher—Bey was qualified to receive anything but a 90% score. Given this difficulty, the court proceeds to the "principle question" on summary judgment, that is, the existence of a discriminatory motive for the employment decision. See Lam, 40 F.3d 28 at 1559.

v. SMC Pneumatics, Inc., 103 F.3d 1394, 1399 (7th Cir. 1997) 2 (listing nepotism and personal friendship as nondiscriminatory reasons); Fisher v. Vassar College, 114 F.3d 1332, 1337 (2d Cir. 1997), cert. denied, 118 S.Ct. 851 (1998) (nepotism); Peterson v. City College, 32 F. Supp. 2d 675, 686 (S.D. N.Y. 1999) (procedural irregularities) Furthermore, Belcher-Bey has not provided evidence to support his general contentions that a pattern of discriminatory hiring practices exists at the FTB and that the FTB has violated its Affirmative Action Plan.[18] Thus, he has not presented evidence from which a reasonable inference of discriminatory animus at the interview level may be drawn.

Although Belcher-Bey is unable to show that the interviews provided the hiring decision-makers with information on the race of applicants, he does present evidence that the decision-makers did know the race of the applicants in two situations: (1) they knew the race of persons selected on the basis of their previous FTB employment; and (2) Cathy Adams of the B & C Section knew Belcher-Bey's race and gender.

In selecting applicants from the 1994 certification list, the FTB first selected all the applicants in Rank 1 and then selected those applicants who had already been FTB employees (both as civil service and as seasonal clerks, student assistants, and youth aides) and those who were civil servants

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[18] The data submitted by co-plaintiff Mills do not demonstrate that hiring of black males is disproportionately low because they do not provide information about the eligible applicant pool. Belcher-Bey neither provides evidence of the Affirmative Action Plan's goals and timetables for the hiring of black men nor explains how Mills' data relate to any goals and timetables of the plan.

employed by other state agencies. Defendant articulates the legitimate, nondiscriminatory reason for preferring the former FTB and other state agency employees that these applicants require fewer training resources and less time to adjust to their new jobs with the FTB.

Belcher-Bey's evidence that some of the former FTB employees were provided with the same training as new hires does not show that these applicants do not adjust more rapidly to working at the FTB. He does not present sufficient evidence to demonstrate that the FTB's reason is pretext for discrimination. Belcher—Bey claims that, with respect to the six positions available in the B & C Section, the decision—makers did have knowledge that he was a black man, because Mills informed Adams of Belcher-Bey's race in an attempt to promote the hiring of black males. Even assuming that Adams had input into the hiring decision, however, defendant has legitimate, nondiscriminatory reasons for the six hiring decisions it made in the B & C Section. Rose Smith filled the first position with an applicant from Rank 1, which indicated superior qualifications to the applicants in other ranks. She filled the other five positions with applicants currently working in the B & C Section in non-civil service positions (i.e., seasonal clerks, student assistants, and youth aides). As stated above, the FTB articulates the legitimate, nondiscriminatory reason that these employees require less time and fewer resources to adjust to working at the FTB.

Belcher-Bey is unable to demonstrate that either reason is pretext for discrimination. Although the declarations he

submits imply that Adams lied to Mills about having attempted to call Belcher—Bey, these statements do not suffice to prove pretext when the declarations indicate Adams' behavior occurred after September 1, 1994, the date the hiring in the B & C Section was completed.

In conclusion, Belcher—Bey has not presented evidence to raise an inference of discriminatory motive behind the FTB's hiring decisions. For some of the positions, he is unable to show that the hiring decision-makers knew the race of the applicants. For the other positions, he cannot rebut defendant's legitimate, nondiscriminatory reasons. Accordingly, Belcher12 Bey's Title VII claim fails.

V. Evans

Evans claims that (a) the FTB discriminated against him on the basis of his race and gender by failing to promote him to the position of Senior Compliance Representative in the Offer in Compromise ("OIC") Unit and failing to select him for a permanent position in the Business Entities Tax System ("BETS") Unit; (b) the FTB retaliated against him for his opposition to workplace discrimination; and (c) defendant West caused or failed to stop Bodmer's accusation that Evans had committed "treason," thereby taking the good name and reputation of Evans without due process of law.

Evans is an African-American male who has worked for the FTB since 1990. When Evans applied for the position of Senior Compliance Representative in the OIC Unit, applications were selected by Robert Mason, Evans' former second-line supervisor. Evans had previously complained to Mason about the

discriminatory or retaliatory conduct of Ken Lewis, Evans' supervisor in 1992. Evans was not interviewed and was denied the promotion. The parties dispute whether Evans submitted a complete application.

Defendant does not challenge Evans' ability to establish a prima facie case regarding this position. Instead it provides the legitimate, nondiscriminatory reasons that Evans' application was incomplete, that Mason had negative experience with Evans' work, that Evans' experience was limited to the collections area, and that the selected applicants had more education than Evans. Evans offers evidence, however, that his application was indeed complete, putting into question whether defendant's stated reason is merely a pretext for discrimination or retaliation.

In July, 1994, Evans began working on a limited-term basis in the BETS Unit. He wanted to continue in the BETS Unit on a permanent basis. He obtained a recommendation from his supervisor and, in May, 1995, he spoke with Eric West about his options for a permanent position. West indicated that decisions about permanent positions were not to be made until later in the year. In January, 1996, 12 employees were selected for permanent positions, but Evans was not one of them.

Defendant argues that Evans cannot show that he was part of the eligible pool of applicants, because staff were selected solely on the basis of their supervisor's recommendations. However, by showing that he had been recommended by his supervisor earlier in the year, Evans is able to raise a triable issue as to his prima facie case. Defendant

has not presented a legitimate, nondiscriminatory reason explaining how, if at all, those selected instead of him were more talented than he at performing the type of work the BETS Unit required.[19]

Defendant is not entitled to summary judgment of Evans' Title VII claims. However, summary judgment of Evans' Section 1983 claim against West is appropriate. Evans does not present an opposition to defendant's motion on the claim against West. In any event, Evans only has hearsay to support that Bodmer ever made the statement. Evans has presented no evidence that West knew Bodmer or knew of the alleged statement.

VI. Brewer

Brewer claims that (a) the FTB discriminated against him on the basis of his race and gender by failing to promote him; (b) the FTB maintained a hostile environment and demoted him in retaliation for his participation in making charges of discrimination; and (c) defendants Goldberg and Watanabe deprived him of his position without due process of law. Brewer does not oppose summary adjudication of his Section 1983 claim against Goldberg. Brewer is an African-American male who has worked at the FTB since 1990. He complains of a long history of negative

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[19] Although defendant points out that Evans cannot show that the decision-makers in the BETS Unit knew of his protected activity, and is thus unable to raise an inference of retaliatory motive, this rationale does not apply to Evans' claim of discrimination on the basis of his race and gender.

Furthermore, the court is not convinced at this time by 27 defendant's argument that a transfer to the permanent position does not confer any advantages to Evans such that being rejected 28 from the position is not an adverse employment action.

treatment at the FTB. He claims to have been subjected to several negative remarks based on his race, gender, and opposition to workplace discrimination.[20]

Brewer also contends that the FTB demoted him and denied him promotions for discriminatory and/or retaliatory reasons. In particular, he did not receive promotions to the OSS I or Tax Compliance Representative positions in 1994. Although he was in Rank 1 on the 1994 certification list for the Tax Technician position, the FTB hired 49 people from the list before offering him a position in 1995.[21] Once in the position of Tax Technician, Brewer was subjected to more critical treatment, he argues, which ultimately caused him to take medical leave for stress. To comply with the conditions placed on his return to work, Brewer was demoted back to the Tax Program Assistant level. He contends this decision was also motivated by retaliatory animus.

Maye's explanation to Brewer about why he would not receive the promotion to Tax Technician in the RCU is telling.

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[20] Such remarks were to the effect that: (1) black women are shrill; (2) black men are lazy; (3) he should "shut up, this is a woman's world;" (4) he would not be looked upon favorably by managers providing training opportunities because he had filed a complaint against a supervisor; (5) "Black people are inferior, 22 because God is white;" (6) he had not been given a special assignment because "blacks are too argumentative;" and (7) "I am not into that black shit. I ain't never had any problems out of anybody but niggers. For example, niggers just killing each other; so don't come to me with that nigga shit. It's not because I'm married to a white man, but niggers ain't shit."

[21] Regarding the Tax Technician position available in the Registration Collection Unit ("RCU"), Maye, Brewer's supervisor in the RCU, told him that he would not be promoted to the position because of how Maye's supervisors felt about Brewer's participation in the Title VII lawsuit and his complaint against his former supervisor.

Brewer has presented evidence from which a rational trier of fact could draw an inference of discriminatory and/or retaliatory motive on the part of the FTB. Also, Brewer has raised a triable issue of fact as to the existence of a discriminatory or retaliatory hostile work environment at the FTB.

VII. Order

IT IS THEREFORE ORDERED that:

(1) defendants' motions for summary judgment of Mills', Oliver's, Lee's, and Belcher—Bey's claims be, and the same hereby are, GRANTED;

[2) defendants' motions for summary adjudication of Evans' claim under 42 U.S.C. § 1983 against defendant West and Brewer's claim under 42 U.S.C. § 1983 against defendant Goldberg be, and the same hereby are, GRANTED;

(3) in all other respects, defendants' motions for summary adjudication be, and the same hereby are, DENIED; and

(4) the case of each remaining plaintiff will be tried separately. The dates of those trials will be set at the time of the Pre-Trial Conference on October 25, 1999.

DATED: July 23, 1999

/s/ William B. Shubb
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE